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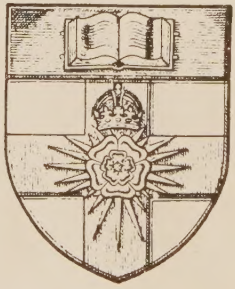

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THE NORTHERN IRELAND LAW REPORTS

1947

BELFAST :
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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW.

1947

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Judges and Law Officers

MEMORANDA.

1947.

2 May. The Hon. Robert Dick Megaw, formerly a Justice of His Majesty's High Court of Justice in Northern Ireland, Chancery Division, died this day.

23 April. The Rt. Hon. John Clarke MacDermott, a Justice of His Majesty's High Court of Justice in Northern Ireland, King's Bench Division, was appointed to be a Lord of Appeal in Ordinary in the place of the Rt. Hon. Lord Wright, resigned. The Rt. Hon. John Clarke MacDermott was granted the dignity of a Baron for life by the style and title of Baron MacDermott of Belmont in the City of Belfast, and was afterwards sworn of His Majesty's Privy Council.

5 June. The Rt. Hon. William Lowry, K.C., M.P., Attorney-General for Northern Ireland, was appointed to be a Justice of His Majesty's High Court of Justice in Northern Ireland, King's Bench Division, in the place of the Rt. Hon. Mr. Justice MacDermott, raised to be Lord of Appeal in Ordinary.

6 June. Lancelot Ernest Curran, Esquire, K.C., M.P., was appointed to be Attorney-General for Northern Ireland in the place of the Rt. Hon. William Lowry, K.C., M.P., raised to the High Court bench.

Lord Chief Justice:

THE RIGHT HON. SIR JAMES ANDREWS, BART.

Lords Justices of Appeal:

THE RIGHT HON. SIR ANTHONY BRUTUS BABINGTON.
THE RIGHT HON. SAMUEL CLARKE PORTER.

Chancery Division:

THE RIGHT HON. ARTHUR BLACK.

King's Bench Division:

THE RIGHT HON. WILLIAM LOWRY.

Attorney General:

LANCELOT ERNEST CURRAN, ESQUIRE, K.C., M.P.

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HAROLD JEFFERSON, Esq., *By the Incorporated Law Society.*

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JAMES MCCONNELL, ESQ., Barrister-at-Law.

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THE COURT OF APPEAL

IN

NORTHERN IRELAND

FITZGERALD v. GREAT NORTHERN RAILWAY (IRELAND) (1).

K.B.D. 1946.

Oct. 15; Nov. 15.

Negligence—Dangerous act done on premises—Voluntary assistance of occupier's servants by stranger—Volunteer—Common employment.

The plaintiff, a coal-merchant's carter, while on the defendants' premises for the purpose of taking delivery of a consignment of coal on behalf of his master, was injured by the negligent operation by the defendants' servant of a crane which was so overloaded as to be dangerous to those in its vicinity. At the time of the accident the plaintiff, at the request of this servant, was temporarily assisting in the operation of lifting by means of the crane a load in which neither the plaintiff nor his master had an interest. The defendants denied negligence and contended further that at the time of the accident the plaintiff was a volunteer and, as such, was precluded from recovering by reason of the doctrine of common employment.

Held, (i) that the plaintiff came on the premises as an invitee; but that even if he had, by deviating from the purpose which brought him on the premises, become a trespasser, his presence was known to the defendants, who were accordingly under a duty not to do a dangerous act likely to injure him without giving warning, and that they had failed in that duty;

(ii) that since there was no actual contract of service between the plaintiff and the defendants the doctrine of common employment could have no application; and

(iii) that the plaintiff though a volunteer was not a "mere volunteer" and was entitled to recover.

(1) In the King's Bench Division before MacDermott J.

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FITZGERALD v. GREAT NORTHERN RAILWAY (IRELAND).

The rule that one who has volunteered to assist the servants of another in their work is in certain circumstances precluded from recovering against the master for damage caused by the negligence of such servants is not an application of the doctrine of common employment, and such a volunteer will be precluded from recovering only if he is a " mere volunteer " to whom in all the circumstances of the case the master owed no duty to exercise reasonable care.

The meaning of " mere volunteer " considered : *Degg v. Midland Railway Co.* (1857) 1 H. & N. 773, examined and explained.

ACTION tried by MacDermott J. without a jury.

The facts and arguments of counsel appear sufficiently from the judgment.

Agnew for the plaintiff.

William Lowry A.-G., Sheil K.C. and *Topping* for the defendants.

Cur. adv. vult.

MACDERMOTT J.

MACDERMOTT J. : On the morning of the 11th August, 1945, the plaintiff was seriously injured as the result of the breaking of the jib or boom of a crane in the defendants' goods yard at Coalisland, County Tyrone. He sues for damages on the ground that his injuries were caused by the negligence of the defendants in permitting the crane to be in a dangerous and defective condition and in overloading it. In their defence the defendants deny negligence and plead contributory negligence and common employment.

The general facts and circumstances of the accident may be stated as follows :—At the time of its occurrence the plaintiff was employed as a carter by a coal-merchant in Coalisland. On the morning in question he went to the defendants' goods yard to take delivery of the balance of a consignment of coal on behalf of his master. To do this he returned to a coal wagon on a siding which he had been unloading the evening before. With the assistance of his brother, James Joseph Fitzgerald, who was in the employment of the same coal-merchant, he filled what was in the wagon into bags ready for loading upon his master's cart. Having

got this length he found that he was five bags short of the consignment. He then went, in company with his brother, to the checker's office to sign for the wagon he had emptied and to be directed to another wagon from which he could complete his load. The wagon at which he had been working was in the open. The checker's office was in a large covered goods shed. This shed is situate between the siding at which the plaintiff had been engaged and another track which abuts on the shed and is served by a platform which is part of the shed floor. The direct way from the emptied wagon to the checker's office, a distance of 30 yards or so, led into the shed by some steps quite close to the office. On this particular morning these steps were obstructed by a number of hampers and boxes with the result that the plaintiff and his brother had to go round the end of the shed and enter it at a point near the other track. Having got in there they then walked across the floor of the shed to the office, a distance of about 50 feet. They did their business there and were directed to another wagon. They then left the office and proceeded to retrace their steps so as to get out of the shed at the point they had entered it. They went this way in order to reach the wagon at which they were to get the remainder of the consignment. With the steps obstructed as they were this was the natural and most practicable route to follow. It took them past the crane in question. This crane was part of the fixed equipment of the goods shed. Its base was about 25 feet from the checker's office and 12 feet from the edge of the platform serving the track which ran along the shed. It was 65 years old, hand operated, and with a wooden jib. When the plaintiff and his brother made their way to the checker's office they passed under this jib which was then pointed towards the edge of the platform where a wagon carrying crated machinery was being unloaded. In returning they kept to the same side of the crane intending to go under the jib again. This was not a matter of choice as the other side of the crane was cluttered with breadhampers and temporarily blocked. As they approached the jib the plaintiff was in front,

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FITZGERALD v. GREAT NORTHERN RAILWAY (IRELAND).

MACDERMOTT J.

with his brother a pace or two behind. The crane hook was attached to a large crate still in the wagon. As they came to the crane the winding gear was operated and the crate was lifted a few inches from the floor of the wagon. The only clear account of what happened in the next few seconds comes from James Joseph Fitzgerald, but I accept his evidence as substantially correct. Three of the Company's servants were engaged in operating the crane. Two were at the handles. The third, Malachy McCarron, was in the wagon. He was the senior man, ranked as a checker and was, I have no doubt, in charge of the job. As the Fitzgeralds came close he shouted to them to lend a hand to help lift the crate. James Joseph was not then past the jib and he bent forward and laid hold of the crate. The plaintiff had just got past the jib when McCarron shouted. He stopped and turned back and bent forward to grasp the crate. Before he could do so the jib broke and part of it fell on his head, rendering him unconscious and knocking his body across his brother's outstretched arms. I do not think the plaintiff could have been more than a pace or so past the jib when he responded to the invitation to assist. But if he had not turned back I am of opinion and find that he would not have been hit. The maximum load for this particular crane was 30 cwt. and this was marked upon it. The weight of the crate being lifted at the time of the accident was about 39 cwt. I find that McCarron knew that what he was lifting was considerably in excess of the permitted loading and sufficient to put a severe strain on the crane.

On the conclusion of the plaintiff's case the learned Attorney-General, on behalf of the defendants, elected not to call evidence and asked for a direction. This application was based mainly on the ground that, assuming negligence on the part of McCarron, the plaintiff had, by turning back to assist, put himself in the position of a fellow-servant, and was debarred from recovering by the doctrine of common employment. In support of this submission reliance was placed upon the judgment of Atkinson J. in *Bromiley v. Collins* (1),

(1) [1936] 2 All. E. R. 1061.

and upon the earlier authorities on liability to volunteers therein mentioned. For the plaintiff, Mr. Agnew contended that in the circumstances the defendants owed a duty to his client. To the plea of common employment he made two answers. Firstly, he submitted that, as there was no contract of service, there was no basis for the doctrine. And, secondly, he contended, citing the decision of the House of Lords in *Wilsons & Clyde Coal Co. v. English* (1), that if the plaintiff had made himself for the time being a servant of the defendants, the doctrine was still inapplicable as the effective cause of the accident was the defendants' breach of an obligation personal to them, namely, that of maintaining their plant in a safe and proper condition.

This last point is ingenious ; but I do not think the evidence supports it. Mr. Agnew relied upon the testimony of James Joseph Fitzgerald to the effect that he had visited the scene about an hour after the accident and had noticed that the wood of the jib was "dozed" or decayed and also worm-eaten. But no attempt was made to show the extent of these defects or where they were in relation to the fractures, and it was admitted in cross-examination that the broken jib had been examined on behalf of the plaintiff by an engineer who was not present at the trial. On this evidence I do not feel justified in finding that the accident was due to these defects. For all I know they may have been of a trivial or superficial character, and I cannot but think that, had they been otherwise, the evidence regarding them would have been much more detailed and exact. As matters stand, I can only relate the breaking of the jib to the substantial overloading of the crane. I find, accordingly, that this overloading was the immediate cause of the accident.

Having found that McCarron knew that he was overloading the crane and putting a severe strain upon it in attempting to lift the crate in the wagon, I must hold that he was negligent. I also find that the plaintiff was not guilty of contributory negligence.

(1) [1938] A.C. 57.

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MACDERMOTT J.

There was nothing to show that he knew or ought to have known that the crane was being overloaded, and had he sued McCarron I think he would clearly have been entitled to succeed.

The question then is whether the defendants are, in law, responsible for the negligence of their servant. The state of the authorities makes this an issue of some difficulty. It will, I think, be a convenient approach to the problem if, first of all, I consider the position as it might have been had the plaintiff not made to assist McCarron, and, then, proceed to examine the special defence which is based on the fact that he did.

It can hardly be disputed that the plaintiff, while on his way out of the goods shed to the wagon from which he was to take the balance of his master's consignment, was an invitee. I must assume that this method of taking delivery was in accordance with the usual practice at this station, and I find that in going to and coming from the checker's office by the route he followed the plaintiff was taking a reasonable and proper step in the customary procedure for the delivery of coal.

Now, whether it is regarded as an application of the rule in *Indermaur v. Dames* (1), or of the wider principle enunciated in *Heaven v. Pender* (2), and quoted with approval by Lord Wright in *Glasgow Corporation v. Muir* (3), the defendants were under a duty to the plaintiff, while an invitee on their premises, to use reasonable care to prevent damage from unusual danger of which they knew or ought to have known. See *Norman v. Great Western Railway* (4), per Buckley L.J., and *Cox v. Coulson* (5), per Bankes L.J. When the plaintiff passed under the jib, McCarron, acting within the scope of his employment, had produced an unusual danger on his employers' premises by overloading the crane. If the plaintiff was still an invitee when struck it seems to me plain enough that responsibility would rest on the defendants and not merely on their servant, having regard to the nature of the duty involved. See

(1) (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.
(2) (1883) 11 Q.B.D. 503.
(3) [1943] A.C. 448, 461.
(4) [1915] 1 K.B. 584, 592.
(5) [1916] 2 K.B. 177, 191.

also *Holmes v. North Eastern Railway Company* (1).

But would this responsibility attach if the plaintiff, when struck, had ceased to be an invitee? The arguments advanced on behalf of the defendants implied, I think, that when he turned back to help and so put himself within what proved to be the danger zone, he became a trespasser. It is, of course, the case that an invitee may, by doing something which is not contemplated by the nature of his invitation, drop down the scale and become a trespasser. As Scrutton L.J. said in *The Carlgarth* (2): "When "you invite a person into your house to use the stair-"case, you do not invite him to slide down the "bannisters."

In this case I think it is at least open to doubt whether the slight and momentary deviation from the pursuit of his purpose as invitee which the plaintiff made would, notwithstanding its unfortunate results, suffice to make a trespasser of him. I shall, however, assume for present purposes that it did, and that when struck he was in no better position than he would have been had he entered and continued on the station premises as a trespasser.

The precise limits of the liability, in negligence, of an occupier of premises to a trespasser thereon cannot be regarded as definitely settled. The decisions of the House of Lords in *Addie & Sons (Collieries) Ltd. v. Dumbreck* (3), and in *Excelsior Wire Rope Co. Ltd. v. Callan* (4), show how fine the dividing line may be between what is and what is not actionable. But I think the latter of these decisions and that of the English Court of Appeal in *Mourton v. Poulter* (5) go to show that, whatever the limits of liability in this sphere may be, a person who does an inherently dangerous act upon the premises he occupies which is likely to injure another whom he *knows* to be thereon is under a duty to warn the other, and will be liable in negligence if he fails to do so and the other, though a trespasser, is injured by the act. As Scrutton L.J. said in

(1) (1869) L.R. 4 Ex. 254.
(2) [1927] P. 93, 110.
(3) [1929] A.C. 358.
(4) [1930] A.C. 404.
(5) [1930] 2 K.B. 183.

K.B.D. 1946.

FITZGERALD v. GREAT NORTHERN RAILWAY (IRELAND).

MACDERMOTT J.

Mourton's Case (1), after a reference to the danger of a continuing trap: "That, however, is a different case "from the case in which a man does something which "makes a change in the condition of the land, as where "he starts a wheel, fells a tree, or sets off a blast when "he knows that people are standing near. In each of "these cases he owes a duty to these people even "though they are trespassers to take care to give them "warning." In *Hillen & Pettigrew v. I. C. I. (Alkali) Ltd.* (2), Lord Atkin refers to this sort of liability in even wider terms, for he says: "I know of no duty "to a trespasser owed by the occupier of land other "than, when the trespasser is known to be present, to "abstain from doing an act which if done carelessly "must reasonably be contemplated as likely to injure "him, and, of course, to abstain from doing acts which "are intended to injure him."

On this view of the law, I am of opinion that the defendants were under a duty to the plaintiff even though, as I am assuming, he was a trespasser, and that, in the circumstances, his injuries were the result of a breach of that duty. In the course of his employment McCarron acted in a manner which put a part of the station equipment, the crane, into a dangerous state. This would not be apparent to a by-stander such as the plaintiff, who would see what seemed a normal, every-day operation. In fact, owing to the overloading, it was one fraught with grave peril for those in the vicinity. The plaintiff's presence at the crane was known. But he was not warned. Had the jib broken as he passed underneath it on his way out of the shed, the defendants' liability would, I think, on the proposition of law I have stated, be clear. Can they be in any better position because their servant, instead of warning the plaintiff, brought him into the danger zone by shouting for his assistance? I do not think they can unless the plaintiff's response to the invitation enables them to plead with success the special defence on which they relied so strongly at the trial and which I must now examine.

It is raised on the pleading by the single averment

(1) Ibid. 191. (2) [1936] A.C. 65, 70.

that if the defendants were negligent "the said "negligence was that of a fellow servant of the plaintiff "acting in common employment with him." In point of fact the plaintiff was not at any time the servant of the defendants. He had no contract with them, either express or implied, and I so find. In view, however, of the submissions advanced on behalf of the defendants and the decisions upon which they were based, I think I would hardly be doing justice to the substance of this plea if I regarded it as only sustainable on proof that the plaintiff was a fellow servant of McCarron's. I will, accordingly, take it as meaning, in addition, that if the plaintiff was not a fellow servant, he must be deemed such for the purposes of the doctrine of common employment.

That doctrine was first applied in 1837 in *Priestley v. Fowler* (1), and so is not old as common law rules go. But it has had a chequered career, reflecting something of the social history of the last hundred years ; and it has fallen steadily in judicial favour after what seems to have been a very promising start. The core of the doctrine is still untouched and must be respected until the Legislature decrees otherwise ; but the trend of decision has been to limit its scope in accordance with certain defined principles and to discourage its further development. The same trend is evident with regard to the law regulating a master's liability for injury caused by the negligence of his servant to one who has volunteered to assist that servant in the performance of his master's business. Indeed, this branch of the law has been so annexed to the doctrine of common employment as to be commonly regarded as part of it. I cannot but think that this association has been the cause of some confusion. But, however that may be, the fact remains that to ascertain the present state of the law applicable to the defence under discussion, it is necessary to examine the older authorities in the light of the more recent cases establishing the trend to which I have referred. This, I fear, necessarily involves reference to a series of decisions covering a lengthy period. So far as possible I shall consider them in chronological order.

(1) (1837) 3 M. & W. 1.

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In *Degg v. Midland Railway Company* (1), one James Degg was in the defendants' goods shed at Cheltenham on the business of his masters, Messrs. Pickfords, when he noticed several servants of the defendant company having difficulty in turning a truck on a turntable close to the shed. Degg, on his own initiative, left the shed and went to assist them. Whilst doing so he was killed by, as was alleged, the negligence of other servants of the company in the management of a shunting engine which pushed another truck against him. On demurrer the Exchequer held that his widow and administratrix could not recover. The judgment of the Court was delivered by Bramwell B. who said, first of all: "The cases shew that if the "deceased had been a servant of the defendants, and "injured under such circumstances as occurred here, "no action would be maintainable: and it might be "enough for us to say that those cases govern this, "for it seems impossible to suppose that the deceased, "by volunteering his services, can have any greater "rights or impose any greater duty on the defendants "than would have existed had he been a hired "servant." Then he referred to the argument that the doctrine of common employment could not apply as there was no contract of service, and proceeded to put the decision on two alternative grounds which I think may be summarised thus: first, an agreement for gratuitous service should be implied between the deceased and the defendants, and, secondly, the deceased was a trespasser to whom the defendants owed no duty. This case has not infrequently been regarded as an instance of the application of the doctrine of common employment. In my opinion this view must be restricted to that part of the decision which is expressly related to an implied contract of service. Beyond that the judgment, as I read it, was not intended as an exposition of that doctrine at all. It is directed to the extent of a master's vicarious responsibility, or, more specifically, to the question of a master's liability for the negligence of his servant to a trespasser. The broad principle this part of the

(1) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R. 364.

judgment proclaims is that a master is not responsible for such negligence if in the circumstances he himself was not under a duty to the trespasser. There are, however, passages in the judgment which suggest that the negligence of a servant causing injury to a trespasser can never be imputed to the master. I have read the judgment in the three reports to which I have referred and I am not satisfied that, taken as a whole, it was meant to go as far as that. If it was it cannot now be considered an accurate statement of the law in view of the later decisions, particularly those relating to the duty of an occupier of premises. And I think this is so whether the term trespasser is used in the *Indermaur v. Dames* (1) sense or with the wider meaning of one who voluntarily intermeddles in the business of another.

In *Potter v. Faulkner* (2), "the principle of the "judgment in *Degg's Case* (3)" was affirmed in the Exchequer Chamber. There the plaintiff, while waiting at the defendant's premises to get his master's lorry loaded with cotton, was asked by the defendant's carter to assist in packing the bales then being lowered from the defendant's warehouse into the defendant's lorry. The plaintiff did so and, while working on the defendant's lorry, was struck and injured by a bale which the defendant's servants in the warehouse negligently allowed to fall through a doorway some distance above. It was held that the plaintiff could not recover and Erle C.J. in delivering the judgment of the Court said: "This is the case of one who "volunteers to associate himself with the defendant's "servant in the performance of his work, and that "without the consent or even the knowledge of the "master. Such an one cannot stand in a better "position than those with whom he associates himself "in respect of their master's liability: he can impose "no greater obligation upon the master than that to "which he was subject in respect of a servant in his "actual employ. And it is clear law that the master

(1) (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.
(2) (1861) 1 B. & S. 800.
(3) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W. R. 364.

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"would not have been liable if the servant below had "been injured by the negligence of the servants above."

In *Wright v. London & North Western Railway Company* (1), the defendant company were carrying a heifer for the plaintiff in a horse-box to Penrith. On arrival there the plaintiff, who was travelling on the same train, assisted the defendant's servants to shunt the horse-box to a siding in order to get his heifer without delay. While he was doing so he was injured by reason of the negligence of other servants of the company in the management of a train. *Degg's Case* (2) and *Potter v. Faulkner* (3) were cited for the defendants in support of the plea that the plaintiff was assisting their servants and was in the same position as a servant of the company. The Court of Appeal, affirming the Queen's Bench, ruled against this contention and held the plaintiff entitled to recover. Lord Coleridge C.J. considered that the defendants were under a duty to the plaintiff. As he put it (4), "being bound by contract to deliver the heifer to the "plaintiff, they, by their representative the station-"master, allowed the plaintiff to take part in the "delivery, and they were therefore bound to see that "he did not get injured by the negligence of their "servants." Mellish L.J., in the course of his judgment observed: "It is settled by *Degg v. Midland Railway* "*Company* (2) and *Potter v. Faulkner* (3), that if a "man's servant invites a friend as a mere volunteer, "for his own amusement, as it were, to take part in a "dangerous duty, and he meets with injury in the "course of it, the master is not liable. The present "case differs in several essentials. First, the plaintiff "was not a mere volunteer, but was assisting to get "his own heifer." And Cleasby B. said: "Is the "plaintiff here in the position of a fellow servant? "The plaintiff was in that position in *Degg. v. Midland* "*Railway Company* (2) and in *Potter v. Faulkner* (3). "But he is not so here. He has not agreed to be the

(1) (1876) 1 Q.B.D. 252.
(2) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R. 364.
(3) (1861) 1 B. & S. 800.
(4) (1876) 1 Q.B.D. 252, 255.

"fellow-servant of the defendants' servants. But, "according to a usual practice, he has assisted in the "delivery of his own goods, on his own behalf, not as "a servant of the company." This decision did not overrule *Degg's Case* (1) but, in effect, confined it to "*mere volunteers*," and established that one who in the pursuance of a common interest assists the servants of another with the consent of that other, express or implied, is not a *mere volunteer*.

In *Swainson v. The North Eastern Railway Company* (2), a servant of the railway company was killed by the negligence of a servant of another railway company. Both companies had agreed to work the station at which the accident occurred on a joint basis. The duties of the servants concerned related to both railways and their pay was treated as a joint charge and borne equally by both companies. The Court of Appeal, reversing the Exchequer Division, held that the deceased's widow was entitled to recover against the company whose servant had been negligent on the ground that the doctrine of common employment rested on common service as well as common employment. The contention that the deceased was a volunteer within the principle of *Degg's Case* (1) was rejected, though it is to be observed that Cotton L.J. cited that decision as authority for the proposition that "a volunteer is in the same position as a servant."

In *Johnson v. Lindsay & Co.* (3), the House of Lords made it clear that the doctrine of common employment could not be availed of if the relationship of master and servant did not exist. In the course of his speech, however, Lord Herschell said, (4): "The general "servant of A. may for a time or on a particular "occasion be the servant of B., and a person who is "not under any paid contract of service may nevertheless have put himself under the control of an "employer to act in the capacity of servant, so as to be "regarded as such. This, as has been pointed out, is "the position of a volunteer. But it is obvious that

(1) (1857) 1 H. & N. 773; 26 L.J.(Ex.) 171; 5 W. R. 364.
(2) (1878) L.R. 3 Ex. 341.
(3) [1891] A.C. 371.
(4) Ibid. 377.

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"if the exemption results, as it does according to the "authorities I have cited, from the injured person "having undertaken, as between himself and the "person he sues, to bear the risks of his fellow-servant's "negligence, it can never be applicable when there is "no relation between the parties from which such an "undertaking can be implied."

In *Bass v. Hendon Urban District Council* (1), the plaintiff, a boy of 14, had been asked by the defendants' firemen to assist in pulling the defendants' fire escape home after a fire drill. He did so and while so engaged was seriously injured owing to the negligence of the firemen. The defendants pleaded common employment and cited *Degg's Case* (2). Darling J. held for the plaintiff on the ground that the doctrine of common employment did not apply to an infant. The Court of Appeal reversed this decision. Vaughan Williams L.J. considered the doctrine applicable and evidently thought *Degg's Case* (2) in point. He said, according to the report: "This case was covered by authorities "which placed volunteers in the same position as "employed workmen, and which had the effect of "making these boys persons in common employment "with those who had the management of the fire "escape."

In *Houghton v. Pilkington* (3), the plaintiff at the request of the defendant's servant got into the defendants' cart to render assistance to another servant of the defendant who had been rendered unconscious by an accident. Owing to the negligence of the servant who had made the request the plaintiff fell out of the cart and was injured. It was held by a Divisional Court (Bray and Bankes JJ.) that she could not recover on the ground that the existence of the emergency did not confer upon the driver authority to invite the plaintiff into the cart or impose any duty on the defendant towards her. Neither of the learned Judges appears to have regarded the volunteer cases as

(1) (1912) 28 T.L.R. 8, 317.
(2) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R. 364.
(3) [1912] 3 K.B. 308.

directly in point ; but it may be observed that Bray J., in referring to *Degg's Case* (1), summarised what it decided by saying that " it was held that the defendants " were under no greater duty to the plaintiff than to " their own servants."

Williams v. Linotype and Machinery Ltd. (2) was decided in 1914. There the plaintiff's employers had engaged the defendants to repair a linotype machine. While doing this the defendants' servant asked the plaintiff to assist him. The plaintiff agreed and in the course of helping the defendants' servant was injured in consequence of the latter's negligence. The doctrine of common employment was pleaded. Avory J. held that it was not applicable and that the plaintiff was entitled to recover. The learned Judge appears to have accepted the view of Lord Herschell in *Johnson v. Lindsay & Co.* (3), that the scope of the doctrine was wide enough to embrace a volunteer. But he decided the case on the ground that the plaintiff was assisting for the benefit of his employers and that *Wright v. London & North Western Railway* (4) applied.

The doctrine of common employment and its application to volunteers were critically discussed by the Court of Appeal a few years later in *Hayward v. Drury Lane Theatre and Moss' Empires* (5). The plaintiff there was injured by the collapse of a staircase due to the negligence of a servant of Moss' Empires during the rehearsal of a revue. She was not employed by Moss' Empires but was present in the theatre at their request and in the hope and expectation of obtaining an engagement. It was held that she was not a " mere volunteer " and could recover. The judgment of Viscount Reading C.J. makes it clear that he did not regard the doctrine of common employment as applicable on the facts, and that he accepted the distinction between a " mere volunteer " and one assisting in a service in which he has a common interest, as in *Wright v. London and North Western Railway Company* (4). Scrutton L.J. and Neville J. considered

(1) (1857) 1 H. & N. 773 ; 26 L.J. (Ex.) 171 ; 5 W.R. 364.
(2) 84 L.J. (K.B.) 1620.
(3) [1891] A.C. 371.
(4) (1876) 1 Q.B.D. 252.
(5) [1917] 2 K.B. 899.

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Degg's Case (1) and *Potter v. Faulkner* (2) rightly decided, but concluded that they could not be explained on a contractual basis or rested on the doctrine of common employment. As Neville J. put it (3): "there being no contractual relation between the "master and the injured person either real or supposititious in either of those cases, they must both "be excluded from the operation of the doctrine of "common employment. They do not come within "the definition of the rule and yet are relied upon for "the extension of the rule to volunteers : a somewhat "remarkable result. In my opinion, in both *Degg* "*v. Midland Railway Company* (1) and *Potter v.* "*Faulkner* (2), the true ground for the decisions, or "at all events a ground upon which both cases can "be supported, is not the application to them of the "doctrine of common employment at all. In both "cases the injured person when the accident happened "was interfering voluntarily and officiously with the "affairs of another, and it seems to me consistent "both with law and good sense (which in the main "are identical) to hold that in such circumstances the "injured person can have no legal claim against the "master of the servant whose negligence occasioned "the accident." It may also be observed, in passing, that both these learned Judges regarded Lord Herschell's reference to volunteers in *Johnson v. Lindsay & Co.* (4) as obiter.

In Ireland the position of the volunteer has not been so frequently associated with the doctrine of common employment. Indeed, in *O'Sullivan v. O'Connor* (5), the Queen's Bench and the Court of Appeal found against a "mere volunteer" without really discussing the doctrine at all. But in *Murphy v. Ross* (6), it was raised on the pleadings. There, the plaintiff, a boy of 11 years, was directed by the defendant's foreman to accompany the driver of a cart, also in the defendant's employment, for the purpose of guiding him

(1) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R. 364.
(2) (1861) 1 B. & S. 800.
(3) [1917] 2 K.B. 899, 916.
(4) [1891] A.C. 371.
(5) (1888) 22 L.R.Ir. 467.
(6) [1920] 2 I.R. 199.

on his proper route. The boy obeyed and was subsequently injured during the journey by, as was alleged, the negligence of the driver. At the conclusion of the plaintiff's case the trial Judge directed the jury to find for the defendant. The plaintiff's application for a new trial was refused by the King's Bench but allowed by the Court of Appeal, Ronan L.J. dissenting. It was held that there was evidence that the plaintiff was not in the employment of the defendant and was not a "mere volunteer." There are two passages in the judgments to which I would refer. The first is in that of Sir James Campbell C. (1), where he says: "As to the proposition that the defendant owed no "duty to the boy, in the absence of any contractual "relation between them, I am of opinion that as a "universal proposition it is unsound and contrary to "our law, and that it is well established even in the case "of an adult that when he voluntarily assists the "master's servants in a service in which he has a "common interest with the master, and by the invitation or with the acquiescence of the master or his "servant acting within the scope of his employment, "he is not a mere volunteer, and can recover if he is "injured by the negligence of the master's servants." The second is from the judgment of O'Connor L.J. (2), where, after a reference to *Cooke v. Midland Great Western Railway Company* (3), and the duty of an occupier to trespassing children, he says: "That "being so, could it be said that if one of these children, "on the invitation of one of the defendant's servants, "placed himself in an insecure position on a cart "about to start on a journey, and as a result got "injured on the way, the defendant would not be "liable? Surely, if a duty is owing to a child who is a "mere trespasser to drive him away from a dangerous "position, there is a still greater duty owing to a child "who, when doing something by request, exposes "himself to danger. In my opinion any other conclusion would be irrational." That passage comes close to the present case if, in point of law, the de-

(1) Ibid. 207.
(2) Ibid. 216.
(3) [1909] A.C. 229.

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fendants were under a duty to warn the plaintiff of the danger of being in the vicinity of the overloaded crane.

Heasmer v. Pickfords Ltd. (1) was decided by McCardie J. in 1920 without reference to *Murphy v. Ross* (2) which may not have been then reported. There the plaintiff, a boy of 14, was asked by the defendant's servant to steer the leader of three horses drawing a heavy van in a London street. The boy, who was but a bystander, complied and got injured. McCardie J. found that the defendants' servant was negligent but held that the boy was a volunteer and that the doctrine of common employment was a good answer in law to his claim. The head-note, which reads, "The doctrine of common employment is too "well established in the fabric of English law to be "disturbed or departed from even where the plaintiff "is an infant and had no idea of making any contract "of service," reflects the judgment as reported.

Bromiley v. Collins (3), also concerned an infant volunteer. The plaintiff, a lad of 18, got injured whilst assisting the defendant's servants, at their request, in moving a heavily laden trailer. On the assumption that the defendant's servants were negligent, Atkinson J. found himself unable to distinguish *Bass v. Hendon U. D. C.* (4) and *Heasmer v. Pickfords Ltd.* (1) and gave judgment for the defendants.

In *Radcliffe v. Ribble Motor Services Ltd.* (5), the House of Lords had to consider whether two servants of the same master were in common employment for the purposes of the doctrine. I need not narrate the facts of this well-known decision, which further defines the limits of the doctrine and explains yet again that its basis lies in a contractual relationship. Reference must, however, be made to two passages in Lord Wright's speech (6), where he says that "the limitations "which I have explained and which for purposes of "this opinion I wish to emphasize are based on the "fundamental principle that there must be an actual

(1) (1920) 36 T.L.R. 818.
(2) [1920] 2 I.R. 199.
(3) [1936] 2 All E. R. 1061.
(4) (1912) 28 T.L.R. 317.
(5) [1939] A.C. 215.
(6) Ibid. 247.

"contract between the employer and employee so "that it may be possible from the nature and circum- "stances of that contract to imply, though by a fiction "of law, that the employee undertook the particular "risks of the negligence of his fellow employees." And, again: "The decisions which have held that a "volunteer may be met by the defence of common "employment have not come before this House. If "they are right, they can only be considered as special "exceptions to the settled general rule that the basis "of common employment is a contract."

In *Pollock v. Charles Burt Ltd.* (1), the plaintiff, a manager of one of the defendants' branch shops, volunteered to do the work of a canvasser in the same employment who was ill. The work entailed travelling and the defendants sent him a car driven by a driver, also in their employment. Owing to the negligence of this driver the plaintiff was injured. Hilbery J. held for the defendants on the plea of common employment and also, apparently, on the ground that the plaintiff was a volunteer. The Court of Appeal reversed this decision, holding in the light of *Radcliffe's Case* (2) that the plaintiff and the driver were not in common employment. After dealing with this aspect, du Parcq L.J. (3) then adds: "It is said, and Hilbery J. "certainly took the view, that even if this plaintiff had "not been a servant, but had volunteered on that "particular day, although not bound to do so, to do "this mail-order business, and had been driven in the "car, then, on the principle which was laid down, for "instance, in *Degg v. Midland Railway Company* (4), "the defendants would have been absolved from "liability. With great respect, it seems to me that "neither that case nor any other establishes the "proposition which is contended for here by counsel "for the defendants. Again one has to see whether "there is any implied term by which the plaintiff was "bound to take the risk of negligence of one who had "become for the time being his fellow servant."

(1) [1941] 1 K.B. 121.
(2) [1939] A.C. 215.
(3) [1941] 1 K.B. 121, 131.
(4) (1857) 1 H. & N. 773; 26 L.J.(Ex.) 171; 5 W.R. 364.

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In *Holdman v. Hamlyn* (1), the Court of Appeal refused to apply the doctrine to the claim of a child of 10 years though apparently prepared to imply a contract of service. Once more *Degg's Case* (2) was invoked by the defendant. Speaking of it du Parcq L.J. says (3): "It was approved by the Exchequer "Chamber in *Potter v. Faulkner* (4) and is binding on "us. These decisions must, however, be read in the "light of the judgments delivered in this court in "*Hayward v. Drury Lane Theatre* (5). They cannot "be held to rest on the doctrine of common employ-"ment since in neither of them was there any con-"tractual relation between the parties. The same "must be said, I think, of *Bass v. Hendon U. D. C.* (6). "The true ground of all these decisions seems to be "that the volunteer was a trespasser in the sense that "he officiously and illegally meddled with what was "no concern of his."

In *Lomas v. Jones & Son* (7), *Degg's Case* (2) was again cited unsuccessfully. There the defendants' servant had just delivered a heifer from a cattle lorry to the plaintiff at his own premises. The plaintiff had assisted in unloading the lorry without being asked to do so. He then helped the driver to close the doors which hinged at the bottom and lifted upwards. While stooping to raise the second door the plaintiff was struck and injured by the first falling down, it, owing to the negligence of the defendants' servant, having been insecurely bolted. The argument for the defendants, it may be remarked, put the "volunteer" defence in a somewhat new form reflecting the trend of authority, for it is thus expressed in the report: "A "master is not liable to a person who, without his "consent, express or implied, intermeddles with the "duties of the servant. This used to be regarded as a "branch of the doctrine of common employment, but "that idea is no longer held." The Court of Appeal (Lord Greene M.R., Goddard and du Parcq L.JJ.)

(1) [1943] K.B. 664.
(2) (1857) 1 H. & N. 773; 26 L.J.(Ex.) 171; 5 W. R. 364.
(3) [1943] 2 K.B. 664, 667.
(4) (1861) 1 B. & S. 800.
(5) [1917] 2 K.B. 899.
(6) (1912) 28 T.L.R. 317.]
(7) [1944] K.B. 4.

decided that the plaintiff was entitled to recover. The view expressed by Goddard L.J. and accepted by the other members of the Court, was that, even assuming that the plaintiff had no right to assist the driver and was a trespasser so far as the vehicle was concerned, the defendants owed him a duty to take care. As Goddard L.J. said: "The accident happened in the "plaintiff's farmyard. The defendants were invitees, "and as such were bound to take reasonable care, "both by themselves and their servants, that the van "was not a source of danger to the invitor or other "persons lawfully on the premises." It will be observed that when the accident happened the heifer had been unloaded and it would therefore appear that the plaintiff was not furthering a common interest when injured. The case is not, then, on all fours with *Wright v. London & North Western Railway Company* (1). But I do not think it is going too far to say that both decisions turn on the same principle; for in each the plaintiff was injured in breach of a duty which rested on the defendants and not merely on their servants.

The absence of such a duty was the *ratio* of the judgment of Uthwatt J. (as he then was) in *Twine v. Bean's Express Ltd.* (2). In that case the defendants' van driver, while engaged on an authorised journey, gave a lift to one Twine. This was contrary to the driver's express instructions which were stated in notices upon the vehicle and, it would appear, were known to Twine. During the journey Twine was killed owing to the negligence of the driver. It was held that Twine's representative could not recover. The older cases would, I think, justify the view that Twine was a "mere volunteer" or trespasser, but Uthwatt J. placed his decision on a broader and more fundamental basis. He found that the defendants did not owe a duty to Twine. As he observed: "Bean's did not owe a duty to the world at large to "take care, but they did owe that duty to all persons "who might reasonably be anticipated by them as "likely to be injured by negligent driving of the van

(1) (1875) L.R. 10 Q.B. 298; (1876) 1 Q.B.D. 252.
(2) [1946] 1 All E. R. 202.

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"at the time and place in question, and no others. . . . "Bean's could not reasonably anticipate that there "would be this passenger in the van at the time and "place of the accident, and, in my view, therefore, "they owed to the passenger no duty to take care in "the driving of the van."

I will conclude this survey of the authorities by a reference to the recent case of *Colman v. Croft & Sons* (1). The plaintiff's husband was employed by the defendants as a bricklayer. During a labour shortage he volunteered to accompany the defendants' lorry-driver as a helper. Whilst so engaged he was killed by reason of the driver's negligence. Hilbery J. following the decision in *Pollock v. Charles Burt Ltd.* (2) held that the doctrine of common employment did not apply. Now Colman was not a trespasser in any sense and it is clear that the second ground on which the judgment in *Degg's Case* (3) was put was inapplicable on the facts. But it is hard to reconcile the result with the first ground for the Court's decision in *Degg's Case* (3). Hilbery J. recognises this, for he says in the course of his judgment : "I am not unaware that there "is some difficulty in deciding this case on the grounds "I have given created by the decision in *Degg. v.* "*Midland Railway Company* (3)." And later : "That "decision is binding on me, and it has stood since 1857, "but, with the greatest respect, I venture to doubt "whether it would be so decided to-day in the light "of what the House of Lords has now said in *Radcliffe's* "*Case* (4) from which I have already quoted, and of "the authoritative statements we now have defining "the legal principles governing the implication by "the courts of terms in contracts."

It would be idle to suggest that all these authorities can be reconciled or that the principles governing liability to a volunteer have remained unchanged since 1857. Of recent years much has happened to clarify the doctrine of common employment and to reveal, or perhaps I should say to restore, its foundations. The

(1) [1946] 2 All. E. R. 401.
(2) [1941] 1 K.B. 121.
(3) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R.364.
(4) [1939] A.C. 215.

results of this process cannot but touch on the rights of the volunteer for, as we have seen, his legal position was for long related to the law of master and servant. It is not difficult now to see a reason for this association. The liability of a master for the torts of his servant acting within the scope of his employment is very wide, and the broad extent of his vicarious responsibility is much older than the doctrine of common employment. That doctrine was in high favour with the Common Law Courts when the problem of the volunteer presented itself in *Degg's Case* (1). See Lord Atkin in *Radcliffe v. Ribble Motor Services Ltd.* (2). And it is not to be wondered at if, in looking for a basis on which to rest an exception to the *respondeat superior* rule, the Courts had recourse to the new and reputable exception established by *Priestly v. Fowler* (3). I think the double-barrelled judgment of Bramwell B. in *Degg's Case* (1) betrays some uneasiness as to an analogy which made a servant of a stranger. The result, however, was that for a considerable period the rights of the volunteer, no matter how momentary or unpremeditated his intervention, were determined by the doctrine of common employment. In the light of the authorities now available for my guidance, I am of opinion that this cannot be regarded to-day as sound law. Unless the volunteer at the time of his intervention is subject to an actual contract of service with the master of the servant who injured him there is no room for the doctrine. To apply it in the absence of such a relationship would be an extension quite incompatible with its true basis as defined by the House of Lords.

It does not follow, of course, that the volunteer can now recover as though he had not intermeddled or, indeed, that in general he is in any better position than he was while the doctrine attached to him. As I read the cases the law is well settled that a *mere* volunteer cannot recover against the master of the servant who injured him by his negligence in the course of his

(1) (1857) 1 H. & N. 773; 26 L.J. (Ex.) 171; 5 W.R. 364.
(2) [1939] A.C. 215, 226.
(3) (1837) 3 M. & W. 1.

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employment. I do not think the rule is limited to volunteers who are trespassers in the technical sense. But it is not less reasonable on that account. Why should a master be responsible for the negligence of his servant to one who has meddled of his own accord in a matter which was the master's business and not his? There must be limits to the rule and I will consider them later. But in the field to which it is applicable it seems, as Neville J. said in *Hayward's Case* (1), "consistent both with law and good sense." I do not think it has been seriously criticised on its merits. And I see no reason for fearing that its divorce from the doctrine of common employment will diminish these. It may be that if a volunteer is not to be looked on as a fellow servant he will not be able to avail himself of the rights which are peculiarly those of a servant. If injured by an incompetent servant, for example, he may no longer be able to contend that as the master owed a duty to his servants to take care to engage a competent staff, he owed that duty to him. I am not sure that the volunteer was ever able to say that, even when the doctrine of common employment was being applied to him. Logically it would seem that such a result should have followed, though I know of no decision to that effect. If it did, it but serves to show how mistaken the application of that doctrine was, for nothing could be much more irrational than to endow an intermeddler of whom the master knows nothing with a right which of its very nature arises from the master's freedom of choice.

But, as I have said, the rule under consideration has its limits. They are bound up in the expression "mere volunteer" which is used so repeatedly in the cases to indicate those to whom the master is not liable.

When, then, is the volunteer a *mere* volunteer? I think the existence of a common interest is not to be regarded as the sole distinguishing feature. In my opinion the authorities put the distinction on a wider basis and show that the test is whether, having regard to the circumstances of the accident, the master

(1) [1917] 2 K.B. 899, 917.

himself was under a duty to the volunteer to exercise reasonable care. If he was, the volunteer will not be a *mere* volunteer and the maxim *respondeat superior* will apply. It is, I think, impossible to specify, in general terms, the factors which will create such a duty on the part of the master. Foreseeability may often be a relevant consideration ; and the duty may also arise *ex contractu*. But I need not go into that. The reports already show how great the variety of circumstance in these volunteer cases can be, and each instance must be judged on its particular facts. All I would add on this aspect is that in determining whether the duty arises the volunteer can no longer be regarded as a servant if in fact he is not.

I must return now to the plaintiff and what befell him on the goods platform at Coalisland. For the reasons advanced in the earlier part of this judgment I hold that, whatever the plaintiff's exact status at the time he was hurt, the defendants were then, as occupiers, under a duty to him not to engage upon the hazardous operation of using an overloaded crane while he was in a position of peril unwarned of the danger. They failed in that duty. Is the plaintiff then precluded from recovering by reason of the fact that he volunteered his assistance and in doing so got underneath the jib ? He had no concern with the crate which was being lifted and there is, therefore, no element of common interest in the case. But for the reasons already stated and in view of the duty owed him by the defendants, I am of opinion and hold that, although a volunteer, he was not a *mere* volunteer, and that he is, in consequence, entitled to succeed. A different conclusion might very well have been justified had the crane not been overloaded and had the plaintiff been injured by the casual negligence of the cranemen in, say, letting the crate fall on the plaintiff's feet. That, however, is not this case, and the difference is sufficient to make the defendants liable if I am correct in my view of the law.

There remains the question of damages. The plaintiff sustained a severe head injury with a fracture of the base of the skull. He was totally incapacitated

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for a period but has now made a good recovery. He is still troubled with occasional headaches, but I think these will wear off. On the evidence the possibility of traumatic epilepsy is remote though it cannot be left entirely out of account. Taking everything into consideration, I think £400 will be a reasonable measure of the compensation to which the plaintiff is entitled. There will be judgment accordingly, with costs.

Judgment for plaintiff.

Solicitor for the plaintiff : *E. Malachy Doris.*
Solicitor for the defendants : *C. Bailie Gage.*

J. McC.

REX v. ROBERT JOHN McKEE (1).

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Oct. 14; Nov. 8, 9; Dec. 3.

Criminal Law—Practice—Sentence—Prisoner arraigned for murder pleading guilty of manslaughter—Plea accepted—Right of trial judge to read depositions—Whether plea of guilty admits truth of averments in depositions—Trial judge not entitled to assume a deliberate killing.

A prisoner arraigned on indictment charging him with murder pleaded "guilty of manslaughter." The plea was accepted by the Crown with the approval of the trial judge, who, after reading the depositions, passed a sentence of twelve years penal servitude on the assumption that the killing was by the deliberate act of the prisoner, There was no evidence in the depositions that the killing was consequent on provocation or done in self defence.

The prisoner appealed against the sentence on the ground that the judge was not entitled to read the depositions before passing sentence; and that the sentence was based on wrong principles and was excessive.

Held, (i) that the trial judge was entitled to read the depositions for the purpose of assessing the appropriate sentence.

A plea of guilty cannot be regarded as an admission of guilt in the abstract divorced from the essential facts constituting the particular offence which it confesses, and where such essential facts appear in the depositions their truth must be taken to be admitted and cannot be challenged by the prisoner if to do so would be incompatible with the plea. Otherwise the prisoner is not bound by the depositions and is free to dispute their truth; and if he does so the trial judge must either leave the disputed matter out of account in assessing the sentence, or receive evidence upon it and reach a finding.

(ii) that since the acceptance of the plea negatived pure accident, and as there was no evidence that the killing was consequent on provocation or done in self defence, the plea could only be regarded as a confession of killing by some negligent act, and it was therefore not open to the trial judge to interpret it as a killing by deliberate act, and that accordingly the sentence was based on a wrong principle and must be reduced.

APPEAL AGAINST SENTENCE.

The appellant appealed against a sentence of twelve years penal servitude passed by Andrews L.C.J. at the assizes for the County of Antrim. The facts of

(1) In the Court of Criminal Appeal before Babington L.J., Porter L.J. and MacDermott J.

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the case and the arguments of counsel sufficiently appear in the judgment of the Court.

Curran K.C. and *Harrison* for the appellant.

W. Johnson K.C. and *McVeigh* for the Crown.

Cur. adv. vult.

BABINGTON L.J.

BABINGTON L.J. read the following judgment of the Court (Babington L.J., Porter L.J. and MacDermott J.): The prisoner, Robert John McKee, was indicted before the Lord Chief Justice for the murder of one William Scott on the 8th March, 1946. Upon being arraigned he pleaded not guilty of murder but "guilty "of manslaughter" and this plea was accepted by the Crown with the approval of the Lord Chief Justice, who sentenced the prisoner to twelve years penal servitude. The prisoner has appealed against this sentence on the grounds, (1) That it was based on wrong principles; and (2) That it was excessive.

Stated shortly, the substance of the case presented by Mr. Curran for the prisoner was that in pleading "guilty to manslaughter" he only admitted killing by negligence but was nevertheless sentenced on the basis that the killing was intentional; and that the sentence was therefore wrong in principle and excessive.

Before coming to the main argument Counsel contended first that when a prisoner pleads guilty he admits the offence to which he pleads and nothing more, and does not admit any of the averments contained in the depositions upon which the indictment is based; and secondly, that the Court, when considering what sentence should be imposed, is not entitled to look at the depositions.

The only authority relied on as establishing the first of these propositions is to be found in the judgment of Hawkins J. in *Reg. v. Riley* (1), where he says: "In regard to a question suggested in the case, whether "a person by pleading guilty to an indictment thereby "admits the truth of the facts stated in the depositions,

(1) [1896] 1 Q.B. 309, 318.

"I think it right to express my opinion that he does "not. He admits simply that he is guilty of the "offence as charged in the indictment and nothing "more."

We are not satisfied that Hawkins J. intended this passage to have the wide application contended for by Mr. Curran. There can be no doubt that a prisoner who pleads guilty to an offence does not thereby necessarily admit the truth of all that may be contained in the depositions grounding the charge. But such a plea cannot be regarded as an admission of guilt in the abstract, divorced from the essential facts constituting the particular offence which it confesses. Normally those facts will appear upon the depositions, and to the extent that they do a plea of guilty will admit the truth of what is in the depositions. It follows, therefore, that a prisoner cannot, after such a plea, be heard to challenge an averment in the depositions if to do so would be incompatible with his plea. But beyond this he is not bound by the depositions and is free to dispute their truth.

On the question whether, for the purpose of assessing punishment, the Court may look at the depositions, there does not appear to be any direct authority; but the following passage appears in Hayes' Digest of the Criminal Law of Ireland, 1842, Vol. 1, p. 414: "If the defendant has pleaded guilty the sole remaining "duty of the Court is to pass judgment upon him. "In cases where the punishment is discretionary the "Court usually reads over the depositions that it may "the better admeasure the punishment and then "pronounces its sentence."

This has always been the practice in our Courts. The depositions are always furnished to the Judge, and to this Court on appeal against sentence, and have always been used for this purpose without objection. The absence of direct authority on the point suggests to us that the practice is so well known and long established that it has never occurred to anyone to challenge it.

The right of the Court to consult the depositions for the purposes of sentence does not, of course,

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prevent the prisoner from challenging their truth within the limits we have already mentioned. If he does so, the Court should either leave the disputed matter out of account or else receive evidence upon it and reach a finding, the prisoner being given the benefit of any reasonable doubt. The practice in England would appeal to be similar. See *Rex v. Douglas Campbell* (1), a decision of the Court of Criminal Appeal.

In the present case the accused after his plea made it clear, through his Counsel, that he did not admit the accuracy of the depositions in all respects. But he challenged them specifically only in so far as they related to the condition of the gun which killed Scott and on this he called evidence. It is clear from the transcript that the Lord Chief Justice had read the depositions and was directing his mind to them in considering what sentence he should impose. His right to do so was not challenged at any time during the proceedings and, indeed, Mr. Curran referred to the depositions repeatedly during his address to the Lord Chief Justice on behalf of the prisoner. The point is taken before this Court for the first time that the Lord Chief Justice should not have had regard to the depositions. In our opinion this objection cannot be supported either by authority or on principle.

Turning to the substance of the appeal, the first question to be decided is as to the nature of the act to which the prisoner pleaded guilty, for the measure of the sentence must largely depend upon this.

The crime of manslaughter covers widely varying degrees of culpability, and it is necessary to look at the facts which the Lord Chief Justice had before him to ascertain the implications of the prisoner's plea of "guilty of manslaughter." I summarise the evidence set out in the depositions very briefly as in our view it is unnecessary to go through them in detail.

The deceased, William Scott, was an old age pensioner, and in 1945 went to live at Dundrod, County Antrim, with a Mrs. Henderson, who was upwards of eighty-eight years of age. The prisoner

(1) (1911) 27 T.L.R. 256.

and his father had lived with Mrs. Henderson before the war, at the outbreak of which in 1939 the prisoner enlisted. He was discharged towards the end of 1945 and on the 8th March, 1946, he called with a neighbour of Mrs. Henderson's, James Rankin, and borrowed a single-barrelled gun and some cartridges, as he said, to have a shot at foxes or rabbits. Later on the same day the prisoner called at Mrs. Henderson's and brought the gun with him. William Scott was sitting in the kitchen. Later Mrs. Henderson went out of the kitchen and when she came back the prisoner had gone, and a Mrs. McCullough was there who had come in after the prisoner had left. The place was all messed about with blood and she and Mrs. Henderson found the dead body of William Scott in the coal hole with half of his head blown off. The prisoner left the gun back with William Rankin the same evening and said he had not fired it. He was interviewed by the Police on the following day, the 9th March, and denied that he knew anything about the death of William Scott and made a signed statement in which he purported to account for his movements on the 8th March. He said that the last time he borrowed a gun from Rankin was about four weeks earlier and that as far as he could remember he knew nothing about the shooting of William Scott. He said he had a good lot of drink and was practically "full."

There was other evidence as to the state of the house, the nature of the injuries to William Scott, the fact that the gun had been fired, and the subsequent movements of the prisoner.

There was no evidence of any motive for the killing or of any provocation on the part of William Scott, and the only person who knew what happened in Mrs. Henderson's house on March 8th was the prisoner.

Before sentence was passed the Lord Chief Justice received evidence of the prisoner's previous good character and exemplary Army record and medical evidence that he was sane but that his intelligence was only that "of an average normal boy of ten years "and four months." Evidence was also given by a gunnery expert to prove that the gun with which the

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deceased man was shot was defective and might have gone off accidentally but, after seeing the weapon, the Lord Chief Justice appears to have rejected this evidence and to have acted on the evidence set out in the depositions.

In passing sentence he said : " I am perfectly satisfied in my own mind that the fatal shot was fired " not as the result, as suggested, of a pure accident " (which if established would be a complete defence " to the charge) but that it was the result of pulling " of the trigger probably due to some sudden impulse " of either jealousy or revenge." He therefore treated the case as one in which the deceased met his death as the result of a deliberate act on the part of the prisoner, and he said, further : " I cannot shut out " from my own eyes the fact that in my opinion this " was what I may call a border line case between " manslaughter and murder and it is one that accordingly not only merits but calls for severe punishment."

On the evidence we agree with the Lord Chief Justice that it is impossible to draw the inference from all the facts that William Scott met his death by pure accident.

If this had been so it would have afforded the prisoner a complete defence and, if established, he would have gone free ; but the facts, his own conduct, and his plea negatived pure accident, and accordingly the only possible alternative to murder is killing by negligence. If the prisoner killed William Scott deliberately it was murder, there being no evidence that he was provoked or that he acted in self defence ; but murder has been negatived by the acceptance of the plea of " guilty of manslaughter " and it follows that the plea can only be regarded as one of killing by some negligent act, the nature of which has not been disclosed and as to which we can only speculate.

Having regard to the facts and the record we are therefore of the opinion that the Lord Chief Justice proceeded on a wrong principle when he dealt with the case as being on the border line between murder and manslaughter, and that he should have accepted the plea as one of manslaughter and interpreted it as

killing by negligence and not by the deliberate act of the prisoner, as he says, " probably due to some sudden " impulse of either jealousy or revenge."

The sentence cannot therefore be allowed to stand. The case of *Rex v. Bright* (1) supports the conclusions we have arrived at. There the prisoner pleaded guilty to an offence which was punishable by a more severe sentence if accompanied by circumstances of aggravation. These circumstances were not charged in the indictment but proof of them was given after the plea of guilty was entered. Avory J. who tried the case took them into account when passing sentence. The English Court of Criminal Appeal held that these circumstances could not be taken into account as they were not charged in the indictment and therefore not admitted by the plea of guilty and the sentence was reduced from penal servitude for life to one of ten years penal servitude. Here the sentence must also be reduced and we have to decide what the appropriate sentence should be under the peculiar circumstances of the case.

The acceptance of the prisoner's plea undoubtedly placed the Lord Chief Justice in a position of difficulty when deciding on the proper sentence to be imposed, and this Court is in no better position ; but we must deal with the case as one of killing by negligence and, making the best estimate we can of the degree of negligence to be imputed to the prisoner having regard to all the facts, we think the sentence should be reduced to one of three years penal servitude.

Owing to the unavoidable delay which has taken place since this appeal was presented the sentence will run from the date of sentence by the Lord Chief Justice.

Sentence reduced.

Solicitors for the appellant : *D. Barbour Simpson & Co.*

Solicitor for the Crown : *William Currie.*

J. McC.

(1) [1916] 2 K.B. 441.

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PERROTT v. DAMOLLY SPINNING COMPANY, LIMITED (1).

Nov. 6; Dec. 12.

Emergency Legislation—Control of Employment—National Arbitration Tribunal—Failure to comply with award of Tribunal—Whether a penal offence—Defence (General) Regulations, 1939 (*S. R. & O.*, 1939, *No.* 927), *regs.* 58*AA*, 92—*Conditions of Employment and National Arbitration Order* (*Northern Ireland*), 1940, (*S. R. & O.*, 1940, *No.* 1508).

The failure to comply with an award made by the National Arbitration Tribunal (Northern Ireland) under Regulation 58AA of the Defence (General) Regulations, 1939, is not a penal offence punishable under Regulation 92 of the Defence (General) Regulations, 1939.

CASE STATED by the resident magistrate sitting at Newry Petty Sessions.

A trade dispute between the appellants and certain of their employees, arising out of the refusal of the appellants to reinstate two dismissed employees in their former employment, was referred by the Ministry of Labour to the National Arbitration Tribunal (Northern Ireland) for settlement in accordance with the provisions of the Conditions of Employment and National Arbitration Orders 1940 to 1945, made under Regulation 58AA of the Defence (General) Regulations, 1939. The Tribunal in their award found that the two employees concerned in the dispute should be reinstated forthwith in their normal employment with the appellants, and they awarded accordingly. The appellants failed to comply with the award.

The appellants were charged at Newry Petty Sessions that they between the 10th January, 1946, and the 15th March, 1946, failed to reinstate in their normal employment the two employees as required by the terms of the award of the National Arbitration Tribunal. The appellants admitted the award, but submitted that failure to comply with the award was not a matter of prosecution at a Court of Summary

(1) In the King's Bench Division before Andrews L.C.J. and Porter L.J.

Jurisdiction as such an award did not come within Regulation 92 of the Defence (General) Regulations, 1939. The resident magistrate convicted the appellants and imposed a penalty of £25, but on the application of the appellants stated a case for the opinion of the court.

Sheil K.C., *Johnson K.C.* and *McVeigh* for the appellants.

Nicholson K.C. and *Harrison* for the respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: The question submitted for our opinion in this case is a short one, yet one of considerable public importance: "Is failure to comply "with an award made by the National Arbitration "Tribunal (Northern Ireland) a matter of prosecution "at a Summary Court in that the award of the "Tribunal comes within the Defence (General) "Regulations by virtue of Regulation 92"?

The case which was stated by the resident magistrate, Mr. J. Ritchie Wilson, sets out that the appellants were charged before him on a summons which averred that between the 10th January, 1946, and the 15th March, 1946, the appellants had failed to reinstate in their normal employment two workers, Eileen Clunliffe and Caroline Bradley, as required by the terms of Award No. 494 made on the 10th January, 1946, by the National Arbitration Tribunal in accordance with the Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, made under Regulation 58 AA of the Defence (General) Regulations, 1939.

The resident magistrate held that failure to comply with the award was a matter of prosecution at a Summary Court, and that the award did come within Regulation 92. He, accordingly, convicted the appellants, and imposed a penalty of £25, but stated the case for the opinion of this Court on the application of the appellants.

The National Arbitration Tribunal (Northern Ireland) was constituted by the Ministry of Labour for Northern Ireland by the said Conditions of Employ-

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ment and National Arbitration Order (Northern Ireland), 1940, made on the 9th August of that year by virtue of the powers conferred upon the said Ministry by Regulation 58 AA. of the Defence (General) Regulations, 1939. Regulation 58 AA., it is to be noted, formed no part of the original Regulations of 1939, but was added to them by Statutory Rules and Orders 1940 No. 1217, dated the 10th July, 1940. Prefaced with the words "With a view to preventing work "being interrupted by trade disputes," which clearly set out its object, the Regulation provides that the Minister of Labour and National Service (to be read in Northern Ireland as the Ministry of Labour for Northern Ireland) may by order make provision (amongst other purposes) (*a*) for establishing a tribunal for the settlement of trade disputes and for regulating the procedure of the tribunal; and (*b*) for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute.

The said Order of the 9th August, 1940, set out in its preamble that it was made with the object mentioned in the regulation, namely, "with a view to preventing "work being interrupted by trade disputes." By Article 1 the Tribunal was constituted "for the purpose "of settling trade disputes which cannot otherwise be "determined." The procedure to be followed in connection with the reference of a trade dispute to the Tribunal is laid down in Article 2, such reference being expressed in sub-Article 2 (3) to be "for settle-"ment" of the matter. By sub-Article 2 (5) it is provided that "any . . . award made by virtue of "the foregoing provisions of this Article shall be "binding on the employers and workers to whom "the . . . award relates, and . . . it shall be an "implied term of the contract between the employers "and workers to whom the . . . award relates that "the rate of wages to be paid and the conditions of "employment to be observed under the contract "should be in accordance with such . . . award until "varied by a subsequent . . . award."

It will be observed that the provision contained in this Article in regard to the "binding" character of

the award purports only to affect the civil contractual rights of the parties to the arbitration. The Article is silent, as are the remaining Articles of the Order, and as are also the provisions of Regulation 58 AA., in regard to any further sanction or means of enforcing the Award by prosecution or other criminal proceedings. Nowhere in express terms is a person who fails to comply with the Award said to be " guilty of an " offence against the Regulation or Order " ; nowhere is it said that he is " punishable on summary con- " viction "—phrases which will be found in several of the other Regulations.

It is in these circumstances that reliance is necessarily placed on behalf of the respondent upon Regulation 92. The first comment which one naturally makes upon it is that an award—a very special form of legal document—is not expressly mentioned in it. The second observation is that it is highly improbable that it would have been contemplated or intended by the draftsman or framers of the Regulations that an award should come within the scope of its provisions, as at the time that it was made in 1939 the Order constituting the Arbitration Tribunal, and empowering it to make awards, was not in existence, and in fact might never have been made. These general conditions, however, though important, are not conclusive ; for, although an award may not have been actively present to the mind of the draftsman, yet the language used may be wide enough to embrace it. I pass, therefore, to a closer examination of the terms of the Regulation itself.

Under its provisions a person is guilty of an offence against a Regulation if he contravenes or fails to comply with (*a*) any of the Regulations, or (*b*) any order, rule or bye-law made under any of the Regulations, or (*c*) any direction given or requirement imposed under any of the Regulations or under any order, rule or bye-law made under any of the Regulations. It is clear that the breach of the terms of an award of the Tribunal cannot fall within either (*a*) or (*b*), for an award is neither a Regulation, nor an order, rule or bye-law made under a Regulation. Is an award,

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then, a "direction given or requirement imposed" under any of the Regulations or under any order . . . made under any of the Regulations? No doubt it may be said that the award in the present case was made by the Tribunal, which was itself constituted by the Order (1940 No. 1508) made under Regulation 58 AA. It may, therefore, be argued that the award was made "under the Order" in the sense that it is made pursuant to powers conferred upon the Tribunal by the order. But in my opinion the award itself is neither a "direction given" nor a "requirement "imposed" under the order within the true meaning of those terms as used in the Regulation. The real nature of an award is, and in the present case is expressed to be a "finding." Such finding may no doubt in certain cases involve the giving of a "direction" or the imposing of a "requirement," but not necessarily so. Moreover, even if it does contain such a "direction" or "requirement," then such direction is given or requirement imposed not by or under the order, as required by Regulation 92, but by or under the award itself.

The respondent's case is not assisted in my opinion by reference to the "binding" character of the award in Article 2 (5) of the Order; for the use of the word "binding" in that Article has from its context a purely contractual significance. The sanction there referred to is obviously civil and not criminal in character; and this in my opinion is fully in keeping with the purpose or object of the Arbitration procedure, which, as I have pointed out, was expressly stated both in Regulation and Order to be merely "the *settlement* "of trade disputes."

I would add that to hold that failure to comply with the terms of an award of the Tribunal might be attended with penal consequences would give rise to the anomalous position that where a party to a trade dispute chose that Tribunal for settlement of his dispute he would render himself liable, in the event of such breach of award, to criminal proceedings; whereas by choosing other means of settlement of the dispute—such as under the Industrial Courts Act, 1919, whose

powers of settlement are expressly preserved by Regulation 58 AA. (3)—failure to comply with the Court's award would not have any penal consequences.

If it be said that the view which I have expressed is based upon a narrow and strict interpretation of the words of the Regulation and Order I would only reply that in my opinion no alternative construction is open to the Court when interpreting penal legislative provisions which the Crown seeks to impose upon the subject. It is well established law, based upon elementary principles of natural justice, that the imposition of a tax, the creation of a penalty and the establishment of a crime alike call for the use of plain and certain terms (see the speech of Lord Buckmaster in *Ormond Investment Co. v. Betts* (1)). The liberty of the subject is a principle too precious and too well ingrained in British justice to permit of any person being made a criminal by ambiguous phrases or words of doubtful import. Strict insistence upon this principle in the administration of the law seems to me to be more urgently necessary than ever before in these days in which so much of the power and authority of Parliament is delegated, and becomes largely a matter of Executive administration and control.

I should mention that we were referred by Mr. Nicholson, counsel for the respondent, to the words of du Parcq L.J. (as he then was) in delivering the judgment of the Court of Appeal in *Hulland v. William Sanders & Son* (2), where the learned Lord Justice said : " The hypothetical employer, if he did not even " pretend to be observing the law, would be liable to " prosecution under reg. 92, and, if he persisted in " wrong-doing, he would have to look forward, since " he would then be guilty of a continuing offence, " either to paying a long series of heavy fines or to " almost continuous imprisonment, or to both." These words cannot in my opinion be regarded as governing the present case. *Hulland's Case* (2) was a civil action by a mason for alleged arrears of wages consequent upon his having been paid over a period of time wages at a lower rate than that which was fixed for the

(1) [1928] A.C. 143, 151. (2) [1945] K.B. 78, 87.

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district by the National Joint Council for the building industry. The claim was not based upon any award of a National Arbitration Tribunal, for no such award had ever been made. In fact it failed by reason of the absence of such an award. It was brought under Article 5 of the Conditions of Employment and National Arbitration Order, 1940—the "recognized "terms and conditions" Article—to which it may have been thought that different considerations as regards penalties applied. In any event the words of the learned Lord Justice, spoken in a case in which no penalty under Regulation 92 was sought to be imposed, were entirely obiter on a point which it is clear had not been argued before him, as counsel for both parties appear to have admitted (see p. 81) that the conditions applicable to that case were enforceable by penalty.

In the circumstances mentioned I cannot allow the words of the learned Lord Justice which I have quoted to affect the opinion which I have independently formed and expressed. The answer to the question submitted to us must be in the negative. We allow the appellants their costs which we measure at twenty guineas.

PORTER L.J.

PORTER L.J.: The Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, which was made with a view to preventing work being interrupted by trade disputes, constituted the National Arbitration Tribunal (Northern Ireland) for the express purpose of settling disputes which could not otherwise be determined.

By Article 2 (1) it is provided that a trade dispute, whether existing or apprehended, may be reported to the Ministry of Labour by or on behalf of either party to the dispute, and if in the opinion of the Ministry suitable means for settling the dispute already exist by virtue of any agreement between organizations representative of employers and workers, Article 2 (2) provides that the Ministry shall refer the matter for settlement in accordance with the provisions of such agreement, but if no settlement is thereby reached,

or if a settlement is unduly delayed, the Ministry may cancel the reference and substitute therefor a reference to the Tribunal.

Where no such suitable means of settlement exist Article 2 (3) provides that the Ministry shall take any steps which seem to it expedient to promote a settlement and may, if it thinks fit, refer the matter for settlement to the Tribunal.

Article 2 (5) provides that "any agreement, decision, "or award made by virtue of the foregoing provisions "of this Article shall be binding on the employers and "workers to whom the agreement, decision or award "relates, and . . . it shall be an implied term of the "contract between the employers and workers . . . "that the rate of wages to be paid and the conditions "of employment to be observed shall be in accordance "with such agreement, decision or award until varied "by a subsequent agreement, decision or award."

Article 4 prohibits an employer from declaring or taking part in a lock-out, and a worker from taking part in a strike unless the dispute has been reported to the Ministry and twenty-one days have elapsed since the date of the report, and the dispute has not during that time been referred by the Ministry for settlement.

Article 5 deals with "recognized terms and con-"ditions of employment" and provides that all employers in any particular trade or industry in any district shall observe the recognized terms and conditions in force in that particular trade or industry in the district or such terms and conditions as are not less favourable than the recognized terms and conditions.

The relevant parts of Regulation 92 of the Defence (General) Regulations to which I wish to refer are as follows:—"If any person contravenes or fails to "comply with any of these Regulations, or any Order ". . . made under any of these Regulations or any "direction given or requirement imposed under any "of these Regulations or under any Order . . . made "under any of these Regulations, he shall be guilty of "an offence against that Regulation," that is to say, against Regulation 58 AA. which, with a view to

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preventing work being interrupted by trade disputes, enables the Minister to make provision by Order—

(*a*) for establishing a tribunal for the settlement of trade disputes and for regulating the procedure of the tribunal;

(*b*) for prohibiting subject to the provisions of the Order a strike or lock-out in connection with any trade dispute;

(*c*) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the Order to be, or to be not less favourable than, the recognized terms and conditions.

The contention of the respondent is that the appellants, by failing to comply with an award of the Tribunal that the two dismissed workers should be reinstated in their normal employment were guilty of an offence against Regulation 58 AA. in that they failed to comply with a "direction given or requirement "imposed under" an Order, viz: The Conditions of Employment and National Arbitration Order (Northern Ireland), 1940, S. R. & O. (1940) No. 1508, made under Regulation 58 AA. Counsel for the appellants argued that the award was neither a "direction" nor a "requirement" that it was binding upon both parties merely as a term or condition of the contract of employment, and that the operative words of Article 2 (5) were quite different from the imperative character of the prohibition of lock-outs and strikes contained in Article 4 and the obligation to observe recognized terms and conditions contained in Article 5. He further contended that the award was merely a declaration of rights as between employers and workers, and that the proper and indeed the only method of enforcing the award was by civil proceedings. This argument was met by counsel for the respondent who pointed out that the main purpose of the Order, which was to prevent the interruption of work, might and probably would be defeated if the only way of enforcing an award was by civil proceedings which would involve a delay of perhaps several months, and much longer if the matter were to be taken to the

House of Lords. There is some force in this argument, but I do not think that it assists us in determining whether failure to comply with an award of the Tribunal is or is not an offence punishable under Regulation 92.

I cannot agree that this award is merely a declaration of a right which is to form a term or condition of the contract of employment. The Tribunal having found that the two dismissed workers should be reinstated in their former employment made its award accordingly, and in my opinion the words used have the same force and meaning as if the award had expressly directed or required the employers to reinstate these two workers in their former employment.

Counsel for the appellants has pointed out that, although Regulation 92 has been framed in very comprehensive terms there is no express reference to an award of the Tribunal, and it is obvious that the appellants have not been guilty of a penal offence unless the award in question is or contains a "direction "given or requirement imposed" under the beforementioned Order.

The opening words of Article 2 (5) refer to "any "agreement, decision or award made by virtue of the "foregoing provisions of this Article," that is to say, to any agreement, decision or award of a joint industrial council, conciliation board or other similar body representative of employers and workers as well as to the award of the Tribunal, and in my opinion the award of the Tribunal imposes no other or greater obligation upon employers and workers than an award or decision of any of the other bodies mentioned. The sanction is the same in each case, and I can find nothing in this or any other part of the Order to indicate that a failure to comply with a direction or requirement contained in a decision or award of a joint industrial council or any other similar body differs from a failure to comply with a direction or requirement contained in an award of the Tribunal. If the contention of the respondent is right, a penal offence is committed in each case.

When one considers that millions of the persons

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engaged in industry and commerce have the terms and conditions of their employment determined and regulated by such representative bodies we may well ask why such a far reaching conclusion must necessarily be drawn from the language of Article 2 (5). After declaring that the agreement, decision or award shall be binding, it goes on to specify the manner in which it is to be binding, and indeed the entire latter part of the paragraph, and especially the reference to the variation of the terms and conditions of the contract by subsequent agreement, decision or award, appears to define and limit the nature of the obligation which is binding on employers and workers. That obligation in my opinion is merely civil.

If this were a matter which admitted of any reasonable doubt we should follow the settled principle of law that a penalty ought not to be imposed unless the alleged offence is clearly defined, and that where the words of the enactment are equally applicable to penal and civil consequences the Court will construe the words in favour of the latter alternative : *Dickenson v. Fletcher* (1), *Att.-Gen. v. Till* (2).

If, then, an award of the Tribunal or a direction or requirement contained in the award does not fall within the terms of Regulation 92 as being a " direction" given or a " requirement " imposed under an Order made under the Defence (General) Regulations, it may be asked what is the direction or requirement referred to in that Regulation. We are not called upon to answer this question, but I think it refers to any direction given or requirement imposed by a person or persons duly authorised by the Order to give a direction or impose a requirement. Many examples may be found in the Statutory Rules and Orders. I might mention the power given to an immigration officer under S. R. & O., 1940, No. 1060, to detain any British subject pending his conveyance to Ireland and also to direct the Master of the vessel or the officer in charge of the aircraft in which he came to Great Britain, to convey the British subject to Ireland, and also the power given to a Chief Officer of Police by the

(1) (1873) L.R. 9 C.P. 1. (2) [1910] A.C. 50.

same Order to direct that the British subject be returned to Ireland.

Again, with regard to traffic on highways under S. R. & O., 1940, No. 1299, authority is given to a Regional Commissioner to give directions prohibiting or regulating the use of vehicles or any class of vehicles on all or any of the highways in the area within his region. It is unnecessary to give further examples, but all such cases are in my opinion essentially different from the award of the Tribunal, which is a judicial body, whereas the directions given by the officials above-mentioned are merely administrative acts.

For these reasons I agree that the question should be answered in the negative.

Appeal allowed.

Solicitors for the appellants : *R. A. Mullan & Son.*
Solicitor for the respondent : *Chief Crown Solicitor.*

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FORSYTHE v. BELFAST CORPORATION (1).

Nov. 18; Dec. 16.

Criminal injury—Malicious injury to person—Application for compensation outside prescribed time—Appeal from Recorder of Belfast refusing to extend time—Jurisdiction—Local Government (Ireland) Act, 1898 (61 & 62 *Vict., c.* 37), *section* 5—*Criminal Injuries (Ireland) Act*, 1919 (9 *Geo.* 5, *c.* 14), *section* 1—*Criminal Injuries (Ireland) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 66), *section* 6—*Statutory County Court Rules*, 1899—*R.S.C. Order LIX, rr.* 39, 42.

An appeal lies to a Judge of the Supreme Court from the decision of the Recorder of Belfast and County Court Judge of Antrim refusing to extend the time for making an application for compensation pursuant to the Criminal Injuries (Ireland) Act, 1919.

APPEAL from the decision of the Recorder of Belfast dismissing an application for compensation for criminal injury.

Sheil K.C. and *Hanna* for the appellant.

Curran K.C. and *McVeigh* for the respondents.

During the hearing of the appeal the following judgment on a preliminary point was delivered by Porter L.J.

PORTER L.J. PORTER L.J.: The applicant in this case is a police officer stationed in the City of Belfast who alleges that he was maliciously injured in his person on the 24th February, 1945. The Preliminary Notice of intention to apply for compensation was not served until the 23rd January, 1946, and the Notice of Application for compensation was given on the 26th January, 1946, that is to say, more then eleven months after the injury was inflicted.

The Application is brought under section 1 (1) of the Criminal Injuries (Ireland) Act, 1919, and it is provided by section 1 (2) of the Act that an application for compensation in pursuance of that section may be made at any time within three months of the injury.

(1) In the King's Bench Division before Porter L.J.

When the case came for hearing before the learned Recorder of Belfast an application was made for an extension of the time. That application was refused and the applicant has appealed.

Before the facts of the case are opened there is a preliminary question to be decided, namely: Does an appeal lie to me from a decision of the learned Recorder refusing to extend the time for making the application ?

Mr. Sheil for the appellant relied upon section 6 (2) of the Criminal Injuries (Ireland) Act, 1920, which is as follows :." The powers of *the court or judge* under any " rules of court made in pursuance of sub-section (7) of " section five of the Local Government (Ireland) Act, " 1898, shall include power to extend or vary the time " prescribed by any statute or statutory rules for " making an application for compensation for criminal " injuries or for serving any notice or for doing any " other act, or taking any proceedings in relation to " the application, in any case where it appears to *the* " *court or judge* that such extension or variation is just " and reasonable for any cause whatsoever."

Prior to the passing of this Act it was clear that the power to extend the time was confined to cases where the time is fixed by the rules and did not extend to cases where it is fixed by statute. (*In re Smith and the County Dublin County Council* (1).) That was a case which dealt with the examination upon oath which had to be given in before a Justice of the Peace within three days after the commission of the injury as prescribed by section 137 of the Grand Jury (Ireland) Act, 1836 ; but by section 6 (1) of the 1920 Act that provision ceased to have effect.

In cases of applications for compensation for criminal injury the appeal lies to the Judge of Assize by virtue of section 5 (4) of the Local Government (Ireland) Act, 1898, and under Order LIX, r. 39 of the Rules of the Supreme Court such appeals from the Recorder of Belfast and County Court Judge of Antrim shall be heard by a Judge sitting in Belfast, and by rule 42 of the same Order the several rules of that Order relating to appeals to a Judge of Assize shall apply *mutatis*

(1) (1901) 35 I.L.T.R. 110.

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mutandis to appeals under this Part of the Order, that is to say, to appeals heard by a Judge sitting in Belfast.

Mr. Curran for the Corporation contended that no appeal lies from a decision of the learned Recorder refusing to extend the time. He argued that the "Judge" referred to in section 6 (2) of the 1920 Act was the County Court Judge, and that when the Judge of Assize was referred to he was mentioned in specific terms not merely as "Judge" but as "Judge of "Assize," and he is so described five times in section 5 of the Local Government (Ireland) Act, 1898, and in rule 18 of the 1899 Rules the term "Judge" is defined as meaning County Court Judge.

Since section 6 (2) of the 1920 Act refers to the powers of a Court or Judge under any rules of Court made in pursuance of section 5 (7) of the Local Government (Ireland) Act, 1898, he contended that the word "Judge" in section 6 (2) must be given the same meaning as the word "Judge" in the Rules of 1899, and must therefore mean the County Court Judge.

I am clearly of opinion this contention is wrong and that an appeal does lie. "The powers of the court or "judge" must mean the powers of the County Court or the Judge of Assize. The powers given to the "Court" under rules 9 and 17 of the County Court Rules of 1899 relating to the procedure for compensation are exercisable only by the County Court Judge so that in section 6 (2) of the 1920 Act "Court" must mean County Court Judge. Therefore, if Mr. Curran's contention is correct the section provides that "the "powers of the County Court Judge *or County Court* "*Judge* . . . shall include power to extend or vary "the time (prescribed)." Such an absurdity would suffice to shew that the *Judge* referred to is the Judge of Assize.

With regard to the definition of "*Judge*" in rule 18 of the 1899 Rules as meaning *County Court Judge* it is quite clear that this definition refers only to the construction of the term *in those Rules*, but there is no reason why the definition of the term in those Rules should govern the meaning of the same term in the Act of 1920.

The object of section 6 (2), as we all know, was to give powers to extend and vary the time prescribed by any statute or statutory rules, and it would be very strange indeed if this extraordinary power should be conferred only upon a County Court Judge, when under rule 17 of the 1899 Rules the power to extend the time prescribed by the rules was conferred upon the County Court Judge *and the Judge of Assize.* Why should this very extensive power be confined to one Judge alone, and that the Judge of the lower Court, when the former and less extensive power was given both to the County Court Judge and to the Judge of Assize ?

Moreover, section 6 (2) does not say the powers of the Court or Judge *as defined* in the rules of 1899, but the powers of the Court or Judge under any of the Rules made in pursuance of section 5 of the 1898 Act, and those powers of extension and variation are given specifically to the Judge of Assize as well as to the County Court Judge by Rule 17.

The view I take is confirmed by the terms of the following sub-section (3) where after referring to a refusal of an application by the County Court Judge or Judge of Assize it is provided that the application may be reheard and determined if the "*Court or Judge*" (the same language as in sub-section (2)) is satisfied that the former application would not have been refused had this Act been then in operation or that the refusal was due to the applicant's having abandoned the application by reason of threats, intimidation or apprehension of violence.

The words "Court or Judge" must be given the same meaning in each sub-section, and it is clear to my mind that the word in sub-section 3 means the Judge of Assize. This sub-section furnishes additional confirmation of the conclusion which I have formed, namely, the word Judge in sub-section (2) means a Judge of Assize, and that I sitting in Belfast clothed with all the powers of a Judge of Assize under Order LIX, Part viii, have power to extend the time prescribed by the 1919 Act for making the application.

Solicitor for the appellant : *Henry J. Catchpole.*
Solicitor for the respondents : *Samuel Love.*

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Oct. 28, 29;
Nov. 11, 12,
13, 15.

1947.

Jan. 15.

In re DUNVILLE.
BROWNRIGG AND ANOTHER v. DUNVILLE AND OTHERS (1).

Will—Construction—Sums to be set aside each to produce "£500 per "year free of taxes"—Whether annuities or income of funds— "Free of taxes" at what rate—Investment of funds—Basis of calculation—Recovery by trustees of overpayments to beneficiaries —Direction to pay "free of taxes" referable to United Kingdom taxes only.

A testator gave his residuary estate to trustees in trust for J. D. for life and thereafter for such of the children or remoter issue of J. D. as J. D. should by deed or will appoint. J. D. by his will in exercise of the power directed the trustees to set aside sums of money sufficient (1) "to produce £500 per year free of taxes and "pay the same by quarterly instalments" to W. D., and after the death of W. D. to hold "the capital and interest" for R. D. absolutely; and (2) "to produce £500 per year free of taxes and pay "the same by quarterly instalments" to M. R., and after the death of M. R. to hold "the capital and interest" for R. D. absolutely, and he directed that during the minority of M. R. the income was to be paid to her guardian.

The trustees did not set aside sums of money as directed by the appointor, but had paid the clear yearly sums of £500 each to W. D. and M. R.

W. D. had at all times since the death of J. D. been resident out of the United Kingdom, and it was contended in the case of his appointment that the expression "free of taxes" should be construed to mean free of such taxes as might be locally imposed in the place where he was for the time being residing.

Held, by the Court of Appeal (Andrews L.C.J. and MacDermott J., Babington L.J. dissenting):—

(1) that upon the true construction of the appointments contained in the will of J. D. the appointees were entitled to annuities of the specified amounts free of income tax at the rate from time to time prevailing.

Carmichael v. Gee (1880) L.R. 5 App. Cas. 588 followed.

(2) that in calculating the sums to be set aside to serve the annuities the trustees should take into account any exemptions, rebates or other reliefs in respect of income tax to which the appointees would be entitled so that the annuities would be the specified amounts net, save as modified by the provisions of the Finance Acts, 1941 and 1946.

(1) In the Court of Appeal before Andrews L.C.J., Babington L.J. and MacDermott J.

The principle of *In re Pettit* [1922] 2 Ch. 765 applied.

(3) that if the income of any one of such sums so set aside should in any year not suffice to satisfy the annuity secured by such sum the trustees might resort to any accumulation of surplus income in previous years or in default thereof to the corpus of such sum.

(4) that the trustees were entitled to recoup themselves by deduction from future payments the amounts, if any, which they had overpaid.

(5) that the expression " free of taxes " in a will made in the United Kingdom by a testator resident in the United Kingdom refers to taxes imposed by the law of the United Kingdom in the absence of a contrary intention.

In re Norbury [1939] Ch. 528 followed.

Per Babington L.J.: that upon the true construction of the appointments contained in the will of J. D. the trustees should set aside and invest sums sufficient to produce the specified amounts free of United Kingdom income tax at the current rate in force when the sums were set aside, and should pay the incomes of such sums to or for the benefit of the appointees without any deduction in respect of reliefs or abatements to which the individual appointee might be entitled.

Order of Black J. [1946] N.I. 90 varied.

APPEAL from an order of Black J.

Robert Grimshaw Dunville who died on the 17th August, 1910, devised and bequeathed the residue of his real and personal estate to his trustees upon trust for sale, and after providing for a life annuity to his wife and a protected life interest in his residuary estate for his son John Dunville Dunville he directed that, after the death of his said son, his trustees should hold his residuary estate (subject to the said annuity) in trust for John Dunville Dunville's children or remoter issue in such manner as John Dunville Dunville should by deed or will or codicil appoint.

John Dunville Dunville died on the 10th June, 1929. By his will dated the 23rd September, 1927, he made appointments under the powers conferred upon him by Robert Grimshaw Dunville's will in favour of his son William Gustavus Dunville and his granddaughter Maureen Robertson, the daughter of testator's son Robert Lambart Dunville by his first marriage with Phyllis Combe, in the terms set out in this report in the judgment of Andrews L.C.J.

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IN RE DUNVILLE. BROWNRIGG AND ANOTHER v. DUNVILLE AND OTHERS.

Robert Lambart Dunville died on the 10th January, 1931.

An originating summons was taken out by the trustees of the will of Robert Grimshaw Dunville to have determined, *inter alia*, the following questions :—

(1) and (7). Whether the appointments in favour of William Gustavus Dunville and Maureen Robertson made by the will of John Dunville Dunville were appointments of—

(*a*) Annuities of £500 each free of income tax at the rate from time to time prevailing ; or

(*b*) Annuities of £500 each free of income tax at the rate prevailing at the date of death of John Dunville Dunville ; or

(*c*) Incomes of funds producing incomes of £500 each free of income tax at the standard rate prevailing at the date of death of John Dunville Dunville ?

(2) and (8). Whether the directions in the will of John Dunville Dunville to set aside sums of money sufficient to produce in favour of William Gustavus Dunville and Maureen Robertson £500 a year each free of taxes would be satisfied by the plaintiffs treating as having been set aside at the date of death of John Dunville Dunville the securities set out in the summons ?

(3) and (9). (*a*) Was any surplus income in any year payable in such year to the person entitled to the fund set aside after the death of William Gustavus Dunville and after the death of Maureen Robertson ?

(*b*) Was any deficiency of income properly made up out of—

(i) surplus income of a previous year ?

(ii) the capital of the fund set aside ?

(4) and (10). If the answers to (1) (*a*) and (7) (*a*) were in the negative were the plaintiffs entitled to recoup themselves out of the future incomes of the funds for over-payments made in the past ?

(5) and (11). Were the plaintiffs entitled to recover

from William Gustavus Dunville and Maureen Robertson a part of the income tax repayments made to them in the proportion which the payments made to each of them bore to his and her total income ?

Nicholson K.C. and *Gibson* for the appellant William Gustavus Dunville.

Curran K.C. and *Phelan* for the appellant Mrs. Maureen Robertson.

Sheil K.C. and *Jones* for the Trustees of the will of Robert Lambart Dunville.

Patton K.C. and *Johnson K.C.* for the respondents the Trustees of the will of Robert Grimshaw Dunville, deceased.

The arguments of counsel appear sufficiently in the judgments.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS L.C.J. : By his will, dated the 28th April, 1905, Robert Grimshaw Dunville, who died on the 17th August, 1910, devised and bequeathed his residuary estate to his trustees upon trust, subject to an annuity of £11,000 to his widow, now deceased, and to a life estate to his son, John Dunville Dunville, for all or any such one or more of the children of his said son or his remoter issue in such shares and proportions and with such limitations and upon such trusts and in such manner and form in every respect as his said son should by deed or will or codicil appoint.

By his will, dated the 23rd September, 1927, the said John Dunville Dunville, in express exercise of the powers given to him by the said will of his father, Robert Grimshaw Dunville, made certain appointments upon which the questions to be determined in this matter arise. As the issues depend upon the precise terms of these appointments I set out the material provisions of the will *in extenso* :—

" I direct and appoint that the trustees of the said " Will " (i.e. the Will of Robert Grimshaw Dunville)

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"shall set aside a sum of money sufficient to produce "£500 (five hundred pounds) per year free of taxes "and pay the same by quarterly instalments to my "son William Gustavus Dunville during his life and "after his death shall hold the capital and interest "for my son Robert Lambart Dunville absolutely. "I direct and appoint that the said trustees shall "set aside a sum of money sufficient to produce "£500 (five hundred pounds) per year free of taxes "and pay the same by quarterly instalments to the "daughter of my son Robert Lambart Dunville (by "his first marriage with Phyllis Combe) during her "life and after her death I direct the said trustees "to hold the capital and interest for my said son "Robert Lambart Dunville absolutely. I direct "that during the minority of my said grandchild "the income to be paid (*sic*) to her guardian. I "direct and appoint that the said trustees shall set "aside a sum that shall produce one thousand "pounds per year free of tax and pay the same to "my wife Violet Anne Blanche for the maintenance "and benefit of my daughter Una and after the "death of my said wife shall pay whatever portion "of the income that my trustees may think necessary "for the benefit of my said daughter Una to what-"ever person may have care of her and after the "death of my daughter shall hold the capital and "the unexpended income (if any) in trust for my "said son Robert Lambart Dunville absolutely. "Subject to above provisions I direct and appoint "that the trustees of the will of the said Robert "Grimshaw Dunville shall hold the remainder of "the estate of the said Robert Grimshaw Dunville "in trust for my said son Robert Lambart Dunville "absolutely."

In a subsequent clause of the will, upon which some reliance was placed during the arguments, the testator expressed the hope that in the event of his said son William Gustavus Dunville improving in conduct his said son Robert Lambart Dunville might think fit to add something to the provision which he, the testator, had made for him.

The first and most important question to be determined is whether the appointments in favour of William Gustavus Dunville and the daughter of Robert Lambart Dunville, and for the maintenance and benefit of Una Dunville, are appointments of annuities of the sums of £500, £500 and £1,000 respectively free of tax, or are appointments of the income of three such sums, to be set aside by the trustees of Robert Grimshaw Dunville's will, as in their opinion would be sufficient to produce incomes of the said several amounts respectively. I have grouped all three appointments together, as I am satisfied that there is no sufficient internal evidence in the terms of the several appointments of any intention on the part of the testator John Dunville Dunville to differentiate between them. Either all or none of them are annuities of specified amounts ; and I agree with Black J., from whom this appeal has been brought, that it is our duty in answering the question to have regard to the material provisions of the will taken as a whole. It is only in this way that the true intention of the testator can be determined.

It is not my intention to set out the arguments addressed to us at length. Neither is it my intention to review with detailed analysis the mass of authority to be found in the Reports. No case can be found precisely identical with the present ; and it has been repeatedly said as, for example, by Lord Chelmsford L.C. in *Baker v. Baker* (1), that "in the case of the "construction of Wills, very little aid is to be derived "from authorities. Each case must depend in a great "degree upon its own circumstances and language." There are, however, two decisions of the House of Lords which in my opinion enunciate the relevant principles and illustrate their application. The first is the case to which I have just referred of *Baker v. Baker* (1), in which a testator directed his executor and trustee to get in his estate and to stand possessed of the produce thereof on trust to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when so placed out or invested, the

(1) (1858) 6 H.L.C. 616, 625.

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ANDREWS L.C.J.

dividends or interest should "realise the clear annual "income or sum of £200" and to pay to his wife "such "dividends, interest, or annual income" for her life or widowhood; and he further directed that from her decease or second marriage and in case he should die without issue his trustee should stand possessed of the said principal or trust monies and the stocks funds and securities in or upon which the same should be invested upon the trusts therein mentioned. The testator made further dispositions of the residue of his estate "after "raising thereout the money sufficient to realise the "annuity for my said wife." The estate when got in and invested did not produce £200 a year; and it was held that the widow was not entitled to have the deficiency made good out of the corpus of the estate. In his speech the Lord Chancellor (Lord Chelmsford) said that there was "no principle whatever involved "in the case except that which pervades all these "cases, namely, to ascertain what is the testator's "intention, and to carry that intention into effect." It was apparent, he said, that that intention was that his wife should be paid out of the dividends and interest of the fund, and that that fund in its integrity in case of her death or marrying again should go over to the parties named. The Lord Chancellor distinguished the case from *Wright v. Callender* (1), in which the trustees were to stand possessed of property and to invest a sufficient portion thereof in the public funds of Great Britain to provide an income of £2 a week. That, he said, was not like the case then before the House in which the income was to be paid out of interest and dividends, but it was income that was to be paid at all events. Lord Cranworth put the issues in the case very clearly, and in terms which apply with equal force to the present case, when he opened his speech with the words (2):—"In all these cases "arising upon the construction of wills the real question "is, whether that which is given is given as an annuity, "or is given as the interest of a fund; and when that "question is to be considered, what you must look to

(1) (1852) 2 De G. M. & G. 652.

(2) (1858) 6 H.L.C. 616, 628.

"is this, whether the language of the testator imports "that a sum, at all events, is annually to be paid out "of his general estate, or only the interest, or a portion "of the interest, of a capital sum which is to be set "apart." On that issue he considered that there was no room whatever for doubt that what the testator meant was that out of the dividends of a fund to be set apart a sum of £200 was to be paid annually to his widow ; but it was to be paid out of the dividends only, and the widow could take nothing but the dividends and interest of the investment. My only comment upon *Baker v. Baker* (1), and I make it with all respect, is that the conclusion arrived at by the House of Lords appears to me to be so irresistible that I should not have thought that Sir John Romilly M.R., before whom the case first came, would have arrived at the contrary conclusion, or that the Lords Justices on appeal would have differed from one another in their conclusions. In express terms the payment of the annual sum of £200 was to be made out of "the "dividends interest or annual income" of the fund set aside, and, as I would add by implication, not otherwise.

I would contrast this case of *Baker v. Baker* (1) with the second case to which I wish to make special reference, *Carmichael v. Gee* (2), which was decided by the House of Lords, twenty-two years later, in 1880. In it the testator directed that his trustees should stand possessed of the moneys arising from the sales of his estate which he authorised upon trust to invest the same and to set apart a sufficient portion of such investments as would produce the annuity of £1,200 a year which he bequeathed to his wife for her life payable quarterly on the usual quarter days, such annuity, in case of his wife's second marriage, to be reduced to the annual sum of £150, and subject to such investment to set aside £5,000 for his daughter *Z*. As to the entire residue of his trust estate, and as to that part set apart in favour of his wife and as to such part thereof as should be no longer required to be set apart in consequence of her second marriage, he

(1) (1858) 6 H.L.C. 616.

(2) (1880) L.R. 5 App. Cas. 588.

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bequeathed the same in trust for three grandchildren. The House of Lords held upon this will that the bequest to the widow was of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted (as might be the case during the whole of her life) the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1,200 a year the deficiency was to be made good out of the corpus. Lord Selborne L.C. referring to the words "the annuity of £1,200 a year "which (that is 'which annuity') I bequeath," etc., observes (1) that in his opinion the true effect of that portion of the will is precisely, and to all intents and purposes, the same as if he had said, disengaged from anything as to investment: "I bequeath to my wife "an annuity of £1,200 a year." The Lord Chancellor relied upon the fact that the annuity was to be paid quarterly, and to other circumstances in connection with the bequest as making it in his opinion clear that while the property remained unconverted the annuity was an absolute charge upon the whole estate and of course upon the whole income of that estate. Accordingly, he found nothing in the case except a testator giving an annuity to his wife, desiring her to enter into the immediate enjoyment of it, and contemplating that during the whole of her life it might be a charge upon his general estate; but at the same time providing that if the estate was converted into money, there should be a sufficient investment to secure this annuity, so as to release the rest of the estate, and to enable that to be paid over immediately to the residuary legatees. He considered, in conclusion, that the case fell within the principles of *May v. Bennett* (2), and *Wright v. Callender* (3), and that it was quite different from *Baker v. Baker* (4). Lords Hatherley, Blackburn and Watson concurred.

(1) Ibid. 594.
(2) (1826) 1 Russ. 370.
(3) (1852) 2 De. G. M. & G. 652.
(4) (1858) 6 H.L.C. 616.

Now it is true that upon a meticulously close examination and comparison of *Carmichael v. Gee* (1), with the present case points of difference will be found. In the former case the bequest contained in the will of Robert Gee is expressly described as an "annuity of £1,200"; but I fail to appreciate the distinction sought to be drawn between such words and the words £1,200 "per year"—the phraseology adopted in John Dunville Dunville's will. There is in my opinion no magic in the use of the word "annuity." An "annuity of £—," or an "annual sum of £—", or a "sum of £— per "year"—all have in my opinion the same meaning and legal significance. Where is there evidence in the words employed of any different *intention*—and that is the important point—on the part of the two testators, Robert Gee and John Dunville Dunville? I can find none. Next it may be said that *Carmichael's Case* (1) contained an express provision for the making of the first quarterly payment on the first of the quarter days specified which should happen after the testator's decease, which shows that the gift of the annuity was independent of the execution of preliminary trusts and investment for the purpose of that annuity. But this is in my opinion sufficiently implied in the present case from the direction that the specified sums were to be paid by quarterly instalments, as in fact they have been, without waiting for the setting aside and investment of funds earmarked to produce the specified amounts. Payment by quarterly instalments indicates to my mind that the testator contemplated the payment of a fixed annual sum rather than of an income derived possibly from fluctuating dividends or interest. Again, emphasis is laid by counsel representing the residuary legatee on the use by John Dunville Dunville in his will of the words "income" and "unexpended "income" as indicating that the testator's intention was that only the income of the several funds, whatever that might be, should be paid to the respective beneficiaries. To this argument I reply that no such words are to be found at all in the bequest to William Gustavus

(1) (1880) L.R. 5 App. Cas. 588.

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Dunville, and that in the case of the other bequests the words are only to be found in subsidiary provions as, for example, in a direction for payment to a guardian during the minority of a grandchild, or to his widow for the maintenance of his invalid daughter. They are phrases which were loosely used by a testator who, with some justification, regarded them as synonymous with the specified sums. They cannot affect the clear gifts of these annual sums which preceded them, and which in each case is contained in the direction to "pay *the same*." Grammatically, the words "the same" refer and can only refer to the respective specified sums as their true and immediate antecedents. Why then should we assign an ungrammatical meaning to the testator's words? Why should we say they mean the "interest on" or "the "income of" the funds measured at £500 or £1,000, neither interest nor income having been previously mentioned by the testator when he used these words? For similar reasons I cannot accept the view advanced by counsel that they mean "the produce of the funds" or "the sum produced by the funds." If the testator intended this he should have said so, but he did not do so; and I can only judge of his intention by the words which he did use. No authority has been cited which would justify the suggested modification of the language used by the testator, which in my opinion is quite clear and explicit. The words used are words of gift and not of measure.

The argument was advanced to us that, as the bequest opens with the setting aside of a fund, the freeing of his general estate must be regarded as the testator's paramount consideration, and that it was, accordingly, the interest upon or income of that fund which he intended to bequeath. It is further contended that in this respect the form of the bequest in John Dunville Dunville's will follows upon the general lines of the form of precedent usually adopted when a testator intends to bequeath, not a fixed annual sum, but the interest on a fund. *Carmichael v. Gee* (1), in

(1) (1880) L.R. 5 App. Cas. 588.

which the same precedence was given to the setting aside of a fund, appears to me to provide a complete answer to such arguments.

There is a further consideration which weighs strongly with me in holding that it was the payment of the fixed annual sums mentioned, and not merely the payment of the interest on funds set aside at the discretion of the trustees, which was the primary object which the testator had in mind in making these bequests in his will. It is that in each case the testator directed that the bequest should be "free of "taxes" or "free of tax"—phrases which in my opinion have in this will precisely the same meaning. By the use of such words the testator evidences in my opinion the obvious desire that the sums to be paid annually should be fixed in amount and that they should not be subject to tax fluctuation. If so, is it not reasonable to conclude that he also intended them to be free from dividend or interest fluctuation? In this respect the case in favour of fixed annuities appears to me to be appreciably stronger than it was in *Carmichael v. Gee* (1).

Counsel for the trustee of the residuary legatee was compelled logically to admit upon his argument that had the funds been set aside as directed and had rates of interest risen or rates of tax fallen so as to produce a larger available income, the resulting benefit would have entitled the beneficiaries to receive more than the specified amounts. Such a result, which in my opinion was never intended by the testator, is a further argument against the construction for which counsel contended.

In support of the view which I have expressed upon this first question I would refer, in conclusion, to Theobald on Wills, 7th ed., p. 508. Two cases are there dealt with (1) where there is a clear gift of an annuity followed by a direction to set aside a fund to secure it, and (2) where there is no independent gift of an annuity but only a direction to set aside a fund sufficient to produce by the income thereof an annuity

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or annual sum which is then given to an annuitant, and there is a residuary gift, or the fund is directed to fall into residue on the annuitant's death, or is dealt with as part of the residue. In either case the annuity is charged on and payable out of the corpus of the estate, the direction to set aside the fund being regarded only as a means to an end. Ample authority is cited for the views so expressed; and the application of these principles to the construction of the testator's will in the present case is in my opinion strengthened by the prefacing of the disposal of the residue of Robert Grimshaw Dunville's estate with the words "subject to above provisions." Such ultimate residue could, therefore, only be ascertained when his previously expressed wishes in regard to the payment of the three annual sums had been fully met and satisfied.

Any other result than that which I have indicated would, indeed, be strange on the facts of the present case in which the trustees, who have never set aside any funds to feed the annuities, have, notwithstanding reduced rates of interest and increased taxation, paid in full the specified amounts out of the general estate, without ever being charged, even to the present moment, with a breach of trust.

The remaining questions argued before us can be more briefly dealt with, more particularly because I wish to express my complete concurrence with the views of MacDermott J., whose judgment I have had an opportunity of perusing.

The first of these questions relates to the meaning of the words "free of taxes" which the testator used in connection with the appointments of the first two annuities and the words "free of tax" which he applied to the third annuity. In the first place, I attach no importance to the testator's abandonment of the plural in favour of the singular number. In both cases there is manifest the obvious intention of the testator that the several appointees should receive the fixed amounts which he specified clear of tax; in other words, that there should be no fluctuation in the moneys received by the several annuitants because of fluctuation in the rate of tax. It would have been

difficult for him to have made his meaning more clear in this respect by the use of any other words than those which he employed. And, if this was his intention, it can only be given effect to by the annuities being paid free of income tax at the rate for the time being or from time to time prevailing, and not at the rate which happened to be payable at the time of his death. The testator measured his bounty to the several annuitants; and, having done so, he considered that it was the exceptionally large estate (amounting to upwards of £900,000) out of which he was making the dispositions which should suffer or benefit by fluctuations in tax.

Precisely the same considerations weigh with me in determining whether freedom of tax means freedom at the full current standard rate, or whether the annuitants are bound to give credit for or to make repayments of a proportionate part of any abatements, allowances or reliefs to which they are entitled under the income tax code. I am clearly of opinion that the present case falls within the principle of *In re Pettit* (1) in which Romer J. (as he then was) held that where a testator gives an annuity free of income tax, and the annuitant obtains relief by way of repayment of income tax in excess of the amount properly payable by him, the residuary estate of the testator is entitled to such proportion of the sum so repaid as the annuity bears to the total income of the annuitant. If by reason of the statutory provisions for relief and abatement the annuitant is not liable to the full rate of income tax, and if, in consequence of this, the annuitant is repaid any excess, that excess must be attributed to the entire income of the annuitant, and the proportionate part cannot be retained by the annuitant who has not paid it; it must be handed back or accounted for to the trustees to be credited by them to the residuary legatees who in reality have paid it. To hold otherwise would in effect result in the annuitant receiving in respect of the annuity more than its specified amount. The view which I have expressed is fully supported by the judgments of Morton J. in

(1) [1922] 2 Ch. 765.

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In re Eves (1), and of Uthwatt J. in *In re Williams* (2).

The claim by William Gustavus Dunville that freedom from taxes includes freedom from Dominion tax to which he was liable by reason of his residing abroad cannot be sustained. *In re Norbury* (3)—a decision of Bennett J.—laid it down that where an English testator by an English will gives a pecuniary legacy "free of duty" the only duties payable out of his estate in respect of the legacy are those imposed by English law, unless there are words in the will which make it clear that duties imposed by the law of a foreign country are to be paid thereout. The principle of this case was applied by Farwell J. to a claim which was advanced in *In re Frazer* (4) for the payment out of the testator's residuary estate of income tax payable by the testator's widow who was resident in Kenya Colony, and who was entitled under his will to the annual payment of such a sum as would together with the annual income received by her under her marriage settlement produce an annual income for her of £2,000 free of all taxes (including income tax) and duties. I recognise that a distinction may be drawn between *Frazer's Case* (4) and the present in that the testator's widow in that case did not go to reside in Kenya until some years after the testator's death, whereas in the present case it appears that William Gustavus Dunville is and has at all times since the date of John D. Dunville's death been resident outside the United Kingdom; and it further appears to be accepted without strict proof that he was in Australia at the time of John D. Dunville's death and that he is now in Canada. It is not clear if he was also abroad at the date of John D. Dunville's will. We have no evidence as to his domicile as distinct from residence. In any event on the facts of this case I do not regard the distinction to which I have referred as such that should lead me to a contrary conclusion to that arrived at in *Frazer's Case* (4).

As already stated, the trustees of Robert Grimshaw

(1) [1939] Ch. 969.
(2) [1945] Ch. 320.
(3) [1939] Ch. 528.
(4) [1941] Ch. 326.

Dunville's will have never carried out their duty in setting aside funds to provide the annuities. They now seek the assistance and approval of the Court in regard to the allocation of certain securities for this purpose. I entirely agree with MacDermott J. that this is a purely administrative duty which this Court should not be asked to undertake, more especially as there is no evidence before us in regard to the valuation and prospects of these investments upon which we could safely act. It is for this Court on a Summons such as the present merely to indicate the principles which should guide the trustees ; and in this connection I would content myself with saying that the trustees in setting aside these funds should, if necessary, obtain expert financial advice, and should then, in so far as they can reasonably foresee the future, make the funds reasonably adequate for the purposes intended. In so acting they not only may but should have regard to the economic and financial developments and legislative changes of the years that have passed since the death of John D. Dunville, and in particular to those developments or changes that have resulted from the recent world war. I am wholly unable to accept Mr. Sheil's contention that a sum should be set aside now on the basis of 1929 values and rate of tax, which he freely admits would be wholly insufficient to produce the specified amounts. In my opinion such contention is not supported by *In re Williams* (1), where the only question argued was as to the meaning of the words " without deduction of income tax " ; and the opinion expressed by Romer L.J. in regard to the trustees' duty to set aside such an amount as would produce the income of £1,000 after deduction of income tax " at the current rate " was given before the expiration of the executor's year, and without any question, such as that now under consideration, having arisen. I agree further with Mr. Nicholson that the learned Lord Justice was merely referring to the trustees' general administrative duty in circumstances which, as I have said, were wholly different from the present. In my opinion it is the primary duty of the trustees

(1) [1936] Ch. 509.

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when executing their trust to give effect to the testator's wishes as expressed in his will. "Equity delighteth "in equality." Why should either the Court or the trustees neglect known facts and put themselves in the position possibly of false prophets ? See *In re Bradberry* (1). It is only by basing their judgment on established facts that the trustees can avoid much unnecessary confusion and possible injustice. I may add in this connection that I fully approve of and endorse the view expressed by Black J. as to the desirability of selecting irredeemable trustee investments, or, at any rate, securities sufficiently long-dated to guard against a fall in income during the lives of the several annuitants.

In regard to the question raised by the trustees as to their right to recovery of over-payments made to the annuitants by deduction from future payments, I am clearly of opinion that such deduction is within the competence of the trustees, who have not been charged with wilful default or breach of trust. The difference between the relations of trustee and cestui que trust on the one hand and of debtor and creditor on the other hand in such matters is firmly established. If authority be required for such right of recoupment, it will be found in *In re Ainsworth* (2) and *In re Musgrave* (3). The amounts of such over-payments will, however, be small if my view be correct as to the true nature of the several appointments ; and, accordingly, such deduction will not press harshly upon the annuitants.

As these proceedings have been necessitated largely by ambiguities in the drafting of the will of John D. Dunville operating on the estate of Robert Grimshaw Dunville, and as each party has partly succeeded and partly failed before us, we shall allow the costs of all parties out of the general estate of Robert Grimshaw Dunville. These costs will, however, only include the costs of one Appeal Book which will be divided between the appellants as may be agreed upon or, in default of such agreement, as the Taxing Master may determine.

(1) [1943] Ch. 35, 42.
(2) [1915] 2 Ch. 96. (3) [1916] 2 Ch. 417.

BABINGTON, L.J.: The arguments in this case occupied an inordinate time having regard to the issues involved, which turn on the construction of a few lines in the testator's will.

The testator says: "I direct and appoint that the "said trustees shall set aside a sum of money sufficient "to produce £500 (five hundred pounds) per year free "of taxes and pay the same by quarterly instalments "to the daughter of my son Robert Lambart Dunville "(by his first marriage with Phyllis Combe) during "her life and after her death I direct the said trustees "to hold the capital and interest for my said son "Robert Lambart Dunville absolutely. I direct that "during the minority of my said grandchild the income "to be paid to her guardian."

The will contains two further gifts, one of £500 in favour of William Gustavus Dunville in similar terms, and the other of £1,000 in favour of testator's wife, Violet Anne Blanche, for the maintenance and benefit of testator's daughter with certain powers of maintenance and a similar gift over on the daughter's death in favour of Robert Lambart Dunville absolutely.

The appeal was taken by the beneficiaries of the two gifts of £500, which are the same in all respects; and Black J., who heard the case, treated all three as being subject to the like rule.

The question which was argued at such length before us was whether these gifts are annuities or the gifts of the produce of the funds to be set aside, Black J. having held that upon the true construction of John D. Dunville's will the effect of the appointment is that the trustees are to set aside and invest sums sufficient to produce the amounts of £500, £500 and £1,000 free of taxes at the rate of tax in force at John D. Dunville's death and to pay the income of those sums to (or for the benefit of) the named appointees during their lifetimes and subject thereto to hold the capital of the sums in trust for Robert Lambart Dunville.

The question is a narrow one, but having read and construed this will as a whole, and in particular the terms in which these three bequests are given, I have come to the conclusion that the construction adopted

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by Black J. is correct and should be affirmed.

I will not add to the time this case has already occupied by going over all the authorities again. Black J. has dealt with them exhaustively, and I accept his judgment both on the authorities and on the will itself, and will add little to supplement it. We are not in my opinion driven to hold that the words " pay " the same " must refer to the " five hundred pounds " per year free of taxes " which immediately precede them. Taken out of their context and divorced entirely from the direction to set aside a sum of money sufficient to produce the five hundred pounds and from the other provisions of the will, this construction might be justified. But the whole clause must be read as one and the words " pay the same " taken as referring to the clause as so read. " The same " is therefore the produce of a sum of money set aside sufficient to produce five hundred pounds per year free of taxes. I think the framework of the will and the words used lead to this conclusion as being the most satisfactory construction of a will which is not expressed in clearly unambiguous language.

I do not, however, agree with the conclusion arrived at by Black J. as to how the sum to be set apart is to be measured.

When the testator says that the sum set aside is to produce £500 per year free of taxes, does this mean free of taxes in each and every year that the payments are made, so that any increase in taxes after the fund is set aside must be met out of the fund, in which case it would have to be augmented to meet any such possible increase, or that the calculation is to be made once only according to the standard rate of tax in force at the testator's death ?

If the bequest is the income of a fund to be set aside the latter construction is the more logical one and the case is similar to that of *In re Palmer* (1), where Pickford L.J. says : " No general rule for the interpretation of a " clause freeing legacies from duty can, in my opinion, " be laid down ; the decision must rest in each case " upon the words of the particular clause. In this

(1) [1916] 2 Ch. 391, 401.

"case I think the time at which the duties are to be "ascertained is when the bequests are handed over "or paid. They are to be handed over or paid free "of all duties and deductions, &c., and that must, in "my opinion, mean duties existing at that time." This case was followed by the Court of Appeal in *In re Wedgwood* (1), Lord Sterndale M.R. saying: "In my "opinion the natural time to ascertain the meaning "of the words 'free of all death duties' is when the "legacies are paid in the sense of having been trans-"ferred out and out from the testator's estate."

In re Palmer (2) and in *In re Wedgwood* (1) were cases in which the gifts were to be free of death duties but the principle applied appears to me to be equally applicable to gifts made "free of taxes" as in the present case or "without deduction of income tax" as in *In re Williams* (3). In that case the testator bequeathed his real and personal estate to his trustees upon trust for sale or conversion and directed them "to set aside out of my residuary trust estate such "proportion thereof as shall be sufficient to provide "an income of one thousand pounds (£1,000) per "annum (without deduction of income tax) and shall "pay such income to my said wife during her life and "after her death" in trust both as to capital and income for his adopted daughter. Romer L.J. says (4): "Can that mean anything but that she is to receive "the net amount of £1,000 free of tax? It is said that "this construction will lead to inconvenience owing "to the variation in the rate of income tax; but that "is a matter easily disposed of as the trustees' duty "will be to set aside after one year from the death "of the testator a sum sufficient to produce the income "required at that time. I think their duty will be to "set aside at the end of a year from the testator's death "such an amount as will produce the income of £1,000 "after deduction of income tax at the current rate. "If the rate of income tax increases after that date "so much the worse for the beneficiary." And Lord Greene, then Greene L.J., says that the phrase "without

(1) [1921] 1 Ch. 601, 615.
(2) [1916] 2 Ch. 391.
(3) [1936] Ch. 509.
(4) Ibid. 514.

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"deduction of income tax" has the same meaning as free of income tax (1).

In my opinion this decision applies to the present case and it became the duty of the trustees to set aside a sum sufficient to produce £500 per annum free of United Kingdom income tax at the standard rate current at the end of a year from the testator's death and pay same by quarterly instalments to Robert Lambart Dunville's daughter during her life.

The case of *In re Pettit* (2) was an annuity case and was decided by Romer J. and is not in conflict with the decisions referred to above. The distinction between them is shown in *In re Jones* (3), which was also an annuity case but there the annuity was calculated having regard to the current rate of income tax and was not given free of income tax as in *Pettit's Case* (2) and reliefs in respect of income tax on the annuitant's income were held to belong to her.

I agree with Black J. that this rule has been generally accepted and it appears to me to be both intelligible and equitable, but I do not think it can be applied to the present case because, as both the learned Judge and I have construed the gift, the testator had two matters before his mind when he made this will, first, a desire to give the legatee £500 per year free of taxes, and secondly, to free his estate from all further liability in respect of this sum by setting aside the capital to meet it. When Black J. says, therefore, that "What the "testator had in mind was to provide for an increase "of the named individual's income by a net sum "after taking into consideration any reliefs or abate-"ments to which the individual may be personally "entitled" and then proceeds to apply the rule in *Pettit's Case* (2) I think he has overlooked the fact that the testator must have made some such calculation himself when he directed a sum to be set aside sufficient to pay the £500 per year free of taxes, and that he thought that by doing so he had provided for all predictable contingencies. I take his object in setting aside the capital sum to have been to give the legatee

(1) Ibid. 514.
(2) [1922] 2 Ch. 765.
(3) [1933] Ch. 842.

£500 free of taxes and to free his estate from further liability by setting aside a capital sum to produce the £500. In order to give effect to both intentions " free of taxes " must be read as free from the current rate of income tax in force when the fund is set aside pursuant to the testator's directions.

We are not called on to make any pronouncement on the claims made by the trustees to recoup themselves for overpayments made in the past. The question is a hypothetical one at present and will have to be dealt with if it ever arises on facts and figures which are not before us.

BABINGTON L.J.

As my colleagues have arrived at a different conclusion the order appealed from will be amended in accordance with their opinion and not with mine.

MACDERMOTT J.

MACDERMOTT J. : The first matter for consideration is whether on the true construction of John Dunville Dunville's will, the appointments to which this appeal relates give the appointees annuities or the income of certain funds. It is a difficult question and one on which different minds might well reach different conclusions.

The principles applicable to this task have been stated by Black J. in the course of a very careful and lucid judgment and I need not do more than summarise their effect. The object of the inquiry is to find the testator's intention as expressed in his will. One must not snatch at the literal import of words or phrases isolated from their context. The document must be read as a whole, due weight being given to all the testator has chosen to say and the part being construed in the light of any general scheme or purpose which the entirety reveals. I am also prepared to accept the view that, if there is nothing to choose between two possible constructions but one is workable and the other will cause difficulties of administration, the Court may with propriety favour the former. I think, however, that that rule—if so it may be called—is to be applied with caution ; and I doubt if it is permissible to use it to circumvent a difficulty which might have attached to either construction according

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to the turn of events. For this reason I leave out of account the shadows cast by *In re Reckitt* (1). I appreciate that if " free of taxes " means free of surtax as well as income tax the construction adopted by Black J. avoids, as things have happened, the complications which might otherwise arise were any of the beneficiaries concerned to acquire great wealth. But a similar embarrassment might well have occurred on the same construction if such riches had come to the beneficiary before the testator's death.

The arguments for and against each of the competing interpretations have been marshalled so clearly in the judgment appealed from that I do not propose to re-state them. I have searched in vain through this will for some feature, phrase or expression which might give unequivocal support to one or other of the rival contentions. There are variations in the language of the several gifts—e.g., " free of taxes " and " free " of tax " ; " a sum of money sufficient to produce " and " a sum that shall produce." But I can find no significance in these, nor am I able to derive much help from the fact that in each of the three life appointments the direction to set aside comes first. No doubt common precedent uses that order in providing for the settlement of a fund upon A for life and then over. But this will does not suggest any close attention to precedent, and had the testator written " that amount " instead of " the same " I am fairly confident that few, if any, would have thought twice about the sequence of his directions. I do not think one can get very far in solving a problem like this by relying upon what is usual when it is what is not usual that causes the difficulty.

On the language of these appointments the question appears to me to lie within a narrow compass. The words " capital," " interest " and " income " are apt, in conjunction with the gift over, to indicate a settlement of each fund upon a life-tenant and a remainderman. On the other hand the immediate and only possible antecedents appearing on the face of the will for the words " the same " are the sums of £500, £500

(1) [1932] 2 Ch. 144.

and £1,000 per year free of tax; and if "the same" be construed as referring to these antecedents the gifts in question are annuities. The alternative construction to this ignores the immediate antecedent in each case and reads "the same" as meaning the income of the fund. This amounts to inserting some such expression as "the produce of" after the word "pay" and referring the words "the same" back beyond the immediate antecedent to the sum which the trustees are to set aside.

Neither contention fits altogether easily upon the wording of the will. I must, then, consider first of all which does less violence to the language of the testator; and after that I must enquire if the whole document exhibits some general scheme or purpose indicative of what the final choice should be.

On the first of these points my conclusion is in favour of what I may call the annuity construction. I think it is more compatible with a due regard for grammar and the ordinary meaning of the testator's language than what may be styled the fund income construction. In its common, every-day use the expression "the same," employed as it is here, makes clamant demand for an antecedent. It is a designation of identity and pointless in the absence of something to identify. When one finds it used not once but in a similar context in three successive paragraphs of a document such as the present will, the grounds for divorcing it from the immediate and only possible antecedent in the text in order to apply it to something else which is not there and has to be implied must, in my opinion, be compelling indeed. Does the testator's use of the word "capital" in the gifts over suffice as such a ground? I do not think so. Even assuming for present purposes that the annuity construction involves a right to resort to corpus I do not see why "the capital" should not mean the remaining capital. It is used in relation to a particular point in time and is an apt expression to describe all that then is capital. If this is so the use of the word "interest" does not put the matter further. If it includes accumulations it favours the annuity construction. If it does not

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it means current interest and is no more and no less significant than the word "capital." The testator's use of the word "income" is, I think, capable of sustaining a weightier argument. It occurs only in the second and third appointments. In the second—that in favour of the testator's grand-daughter, now the appellant Mrs. Robertson—there is a direction that during the minority of this beneficiary "the "income" is to be paid to her guardian. In the third the trustees are directed to set aside a sum that shall produce £1,000 per year free of tax and to "pay the "same" to the testator's wife for the maintenance and benefit of his daughter Una. The appointment then continues ". . . and after the death of my said "wife shall pay whatever portion of the income that "my Trustees may think necessary for the benefit of "my said daughter Una to whatever person may have "care of her and after the death of my said daughter "shall hold the capital and unexpended income (if any) "in trust for my said son Robert Lambert Dunville "absolutely." Now I think it may be conceded that "income" is used in the same sense in these passages. And, of course, if its proper meaning is the income of the fund directed to be set aside it is obviously a very cogent point against the annuity construction. I think all three of these appointments must be taken as of the same pattern, and if the testator had once said "income of the fund set aside" instead of just "income" I think it is not too much to say that the problem under discussion would never have arisen. But does the word "income" by itself point in the same direction? It accords, naturally enough, with the fund income construction. But is it necessarily at variance with the annuity construction? I do not think so. The word may, without any abuse of language, be taken in two senses—the annual produce of a fund or the annual sum granted to a beneficiary. If a settlor grants A an annuity of £100 and charges it on the produce of a fund he is not speaking amiss if he refers to the £100 as the income he has given A or if he adds that it is secured by the income of a fund.

I therefore reach the conclusion that so far as

grammatical structure and the ordinary use of language are concerned the text favours the relation of the words "the same" to their immediate antecedents and, therefore, the annuity construction.

I must next inquire if the purport of the whole document supports this or the alternative view. I do not think it can be said to give any very emphatic sign in either direction. But the impression it conveys to my mind supports the annuity construction rather than the fund income construction. It is clear from the terms of the will that the testator was anxious to provide a livelihood for this son and daughter and it looks as though he had the same desire regarding his grand-daughter, though the motive is not so apparent in her case. It is also plain enough that he regarded the sums of £500, £500 and £1,000 per annum as an appropriate provision for his son, grand-daughter and daughter respectively, on the basis that they would be free of tax and spendable. So far, then, as the frame of the will goes I think it is impossible to say that the annuity construction is repugnant to any general intention that may fairly be gleaned from it. On the contrary it seems to me that the broad import of the whole document bespeaks a desire to provide a fixed income for these beneficiaries which, while they live and may need it, will be independent of the vagaries of taxation, rather than an income which could only be regarded as fixed and clear of tax for the year in which the appointor should happen to die. I agree that one is not free to speculate about the extent of the testator's fears for the future; but, on the other hand, it would, I think, be erring in the opposite direction if one were to assume that a gentleman who had lived through the first World War and must have had some experience of taxation as a creature of unsettled habit, thought that it would never be worse when he made his will in 1927.

Nor are we at liberty to speculate as to how far—if he thought of the matter at all—the testator appreciated the problems and difficulties which the trustees might have to face if the appointments made were annuities. But even if he comprehended all the

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possible complications why should he not have given annuities free of tax and directed the setting aside of funds sufficient to serve them if such were his desire ? As appointor he was dealing with an ample estate and he might well have chosen to impose a difficult administration on the trustees as the price of giving these particular beneficiaries an assured and constant income of an amount he thought appropriate. As I have said I do not reject the " workability " rule ; but I fail to see much scope for its operation in the present case.

For these reasons I arrive at the conclusion that the appointments in question were annuities and not appointments of the income of the funds directed to be set aside.

Are these annuities, then, payable free of income tax at the rate from time to time prevailing or at the rate current at the death of John Dunville Dunville ? I think this question answers itself on the construction I have adopted. This means that the trustees are to pay the stated amount each year during the lifetime of each appellant annuitant free of tax. Their annuities should, therefore, be paid free of tax at the rate from time to time prevailing. This answer, however, must be qualified by the answer given to a further question raised by the appeal of Mrs. Robertson. Does " free " of taxes " mean free of income tax at the current standard rate ? Or must the annuitant give credit for a proportionate part of any abatements, personal allowances or reliefs provided for by the enactments relating to income tax ? This depends on whether the principle of *In re Pettit* (1) is applicable. I need not review the relevant authorities as Black J. has already done so. I agree with the conclusion he has reached as to their effect. In my opinion the principle of *In re Pettit* (1) is clearly applicable on the wording of this will. That wording exonerates from tax as the annuitant is liable to pay it. It does not justify an additional gift of the difference between that liability and tax at the standard rate. The annuitants must, therefore, account for a due proportion of the reliefs

(1) [1922] 2 Ch. 765.

and allowances obtained.

I turn next to the submission made on behalf of the testator's son, William Gustavus (who has been resident outside the United Kingdom since his father's death and is now, it would appear, living in Canada) that "free of taxes" means free of such taxes as may be imposed in respect of his annuity by the law of the country in which he may happen to be residing. On this I respectfully adopt the decision of Black J. for the reasons he has given. "Free of taxes" must be taken as referring *prima facie* to United Kingdom taxation. There is nothing that I can see in the present will to enlarge this meaning.

The trustees of Robert Grimshaw Dunville's estate have not, so far, set aside any funds to serve the annuities appointed by John Dunville Dunville's will as thereby directed. They now want to know how they should proceed. But before coming to that it is, I think, convenient to enquire if the annuities will be a charge upon the corpus of the respective funds to be set aside, as this is a matter which may well have a bearing on the duties which the trustees have still to perform.

My adoption of the annuity construction answers this question partially if not completely. Where what is given is a life annuity and a fund is set aside to serve it, the general rule, as I understand it, is that the corpus will be charged unless the terms of the document are such as to show an intention that on the cesser of the annuity the corpus is to go over untouched. For the reasons I have already mentioned the testator's use of the words "capital" and "interest" does not, in my opinion, suffice to show that the corpus is to be left intact. If, as I have held, the gifts here are annuities and not the income of settled funds, the point under immediate consideration seems to me to be clearly governed by the decision in *Carmichael v. Gee* (1). I hold, then, that if the income of one of these funds fails to provide enough to satisfy the annuity it secures the trustees may resort to the corpus. I think, having regard to the terms of these appointments, it follows that, should there be a surplus

(1) (1880) L.R. 5 App. Cas. 588.

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of income in any year, it will remain in the fund and be available with the corpus and in priority to it, to make good subsequent shortages. I refer to this question of surplus income as, though not argued before us, it is raised by the summons. I should add, however, that when I speak of surplus income remaining in the fund I do so without prejudice to any future application which may be made to the Court on the ground that owing to some change of circumstance a fund set aside had grown beyond what could conceivably be necessary to secure its annuity and that a part of it should, therefore, be released to residue. Such a possibility was referred to in the course of the hearing. But it is not before us and I mention it merely to make plain that I am not expressing an opinion upon it.

What, then, must the trustees do to comply with the testator's directions ? It is not for the Court to exercise their discretion or to pick and choose the particular investments to be set aside. For this reason I am against embarking on an answer to questions such as Nos. 2 and 8 in the summons. The trustees are, however, entitled to receive the guidance of the Court as to the general principles which they should follow.

Black J. has already held that the funds must be constituted by setting aside or investing in long dated or irredeemable trustee investments. This of course, stands ; but on the construction I have adopted it does not touch the heart of the administrative problem which is—what should each fund be designed to produce ? What is set aside in each fund should be sufficient to sustain a payment to each appellant for life of his or her annuity free of tax at the rate from time to time prevailing, with the annuitant giving credit for a due proportion of reliefs and personal allowances. But how are the trustees to estimate the future burden of taxation ? That is a difficult task for no one can be expected to foresee with accuracy what future rates will be. Nevertheless, I do not think it means an impossible duty. The law does not expect trustees to be seers. What it requires in matters like this is that the trustees should act with

the diligence and care which an ordinary prudent man of business would take in managing similar affairs of his own. They will, for example, consider as best they can the probable trend of British taxation and inform themselves of any matters personal to the annuitants that may be relevant, such as the tax reliefs and allowances to which they are or may become entitled. And they must bear in mind throughout to hold a fair balance between the interests of the annuitants and the interests of those representing Robert Lambart Dunville, the appointee of the residuary estate. While endeavouring to ensure that each appellant will receive the same sum annually for life free of his or her liability for British tax in respect thereof, they must not be so excessively cautious or over-apprehensive of the future as to reduce the residuary estate unreasonably during the lifetime of the annuitants. It is, of course, impossible to give an exhaustive list of all the trustees should do or refrain from doing in discharging this duty. But I may add, in view of certain submissions addressed to us, that they must, in my opinion, deal with the situation as it confronts them to-day. They have, it is true, made delay in setting these funds aside; but if my interpretation of this will is correct, I see nothing in law or on the facts to warrant a retrospective treatment of the problem, as by regarding interest and tax rates at the death of the testator in 1929. In this connection I may also record the view that the trustees should take into account any changes in the law since that date which may affect the position. There is no question before us as to the applicability or effect of the Finance Act, 1941 and its amendment of 1946 so far as these annuities are concerned. But if those enactments are applicable the trustees will require to consider their bearing on the amounts to be set aside.

There remains the question whether the trustees may recover for the estate, by way of deduction from future payments, any sums which the annuitants may have received from the estate in excess of the annuities to which they are entitled. There is no satisfactory evidence before us as to what these alleged over-payments are. But on the view I have taken of the

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construction of the will and from the statements of Counsel at the hearing, it would appear that this question is now only concerned with over-payments which may have occurred because credit has not been given to the estate for a due proportion of reliefs and allowances in accordance with the rule in *In re Pettit* (1) or because, for some other reason, a repayment of income tax has been received so as to make the actual benefits obtained from the estate greater than those provided by the will.

Black J. had to consider a similar question in relation to a different situation due to his different interpretation of the appointments. But the applicable principle is the same and I respectfully agree with what he has said regarding it. In so far then as over-payments of the sort mentioned have occurred I hold that the trustees are at liberty to adjust the rights of the parties by appropriate deduction from future payments.

For these reasons I would answer the questions involved in this appeal as follows, omitting Nos. 2 and 8 on the grounds already stated :—

1. (*a*) Yes ; (*b*) No ; (*c*) No. 3. (*a*) No ; (*b*) Yes, surplus income of a previous year being applied before capital. 4. Does not arise. 5 and 6. Yes, by deduction in so far as such income tax repayment caused William Gustavus Dunville to receive from the estate of Robert Grimshaw Dunville more than he was entitled to under the appointment made by the will of John Dunville Dunville. 7. (*a*) Yes ; (*b*) No ; (*c*) No. 9 (*a*) No ; (*b*) Yes, surplus income of a previous year being applied before capital. 10. Does not arise. 11. Yes, by deduction in so far as such income tax repayment caused her to receive from the estate of Robert Grimshaw Dunville more than she was entitled to under the appointment made by the will of John Dunville Dunville.

Solicitor for W. G. Dunville : *Thomas Brown.*
Solicitors for Mrs. M. Robertson : *L'Estrange & Brett.*
Solicitors for R. L. Dunville : *E. & R. D. Bates.*
Solicitor for the respondents : *J. Dunville Coates.*

(1) [1922] 2 Ch. 765.

M. V. P.

ROSS v. McQUEEN (1).

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Jan. 2, 23; Feb. 14.

Negligence—Contributory negligence—Continuing negligence of plaintiff—Opportunity of avoiding consequences of defendant's negligence.

In an action by a pedestrian against a motor-cyclist for damages for personal injury sustained in a collision caused by the defendant's negligence the defence of contributory negligence was pleaded. It was contended for the defendant that the plaintiff's contributory negligence was a continuing negligence which persisted up to the moment of collision and that therefore the plaintiff was necessarily precluded from recovery.

Held, that the fact that the plaintiff's negligence persisted up to the moment of collision was not necessarily inconsistent with the plaintiff having had no opportunity of avoiding by reasonable care the consequences of the defendant's negligence; that this was a question of fact; and that upon the facts of the case the plaintiff had no such opportunity.

Dicta in *Campbell v. John Kelly, Ltd.* [1945] N.I. 70, examined.

ACTION tried before MacDermott J. without a jury.

On the 7th August, 1945, the plaintiff, a man of sixty-seven years of age, was crossing a broad thoroughfare in the City of Belfast when he was injured in a collision with the defendant who was driving a motor-cycle. The plaintiff wishing to cross the road had waited on the footpath until several vehicles had passed, and then stepped off the kerb on to the carriage-way between two parked cars, and proceeded to cross without looking for further traffic. The plaintiff was a little over half-way across the carriage-way when the collision occurred. The defendant was travelling at a speed of about 23 miles per hour when he first saw the plaintiff at a distance, as the learned judge found, of at least 30 feet. The defendant could have seen the plaintiff earlier than he did for the road was virtually straight and there was no other traffic. The defendant did not apply his brakes but turned the handle-bars of his machine and allowed himself to fall off. There was no evidence to show whether the plaintiff was struck by

(1) In the King's Bench Division before MacDermott J.

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the machine or by the defendant's body. The plaintiff was unaware of the defendant's approach until he was struck. The plaintiff brought this action for damages for personal injury caused by the defendant's negligence in the driving and control of the motor-cycle. The defendant pleaded the defence of contributory negligence.

Curran K.C. and *Gibson* for the plaintiff.

Nicholson K.C. and *Jones* for the defendant.

Cur. adv. vult.

MACDERMOTT J.

MACDERMOTT J. [after stating the facts of the case continued]:

The defendant pleaded contributory negligence and it is this defence which has made the case one of some difficulty. Counsel for both parties were content that responsibility should be determined by putting the four questions favoured by the Court of Appeal in *Campbell v. John Kelly Ltd.* (1). I shall follow this course as the facts here seem further from the *Swadling v. Cooper* (2) type of case and so are more clearly suited to this procedure than those with which the Court of Appeal had to deal.

I doubt, however, if this method of analysis can in itself satisfactorily settle the issue of liability in this instance unless the scope and import of each question is defined rather more closely than was necessary in *Campbell v. John Kelly Ltd.* (1). I shall endeavour, therefore, to indicate the meaning which I think should be ascribed to these questions for the purpose of reaching a correct decision on the facts of this case. If this method leads to a wrong conclusion it will at least have the virtue of making the error more easily identified and corrected.

It may, indeed, seem strange that what to the layman must appear a very ordinary street accident should involve such a cautious approach. The truth is that even ordinary events of this nature show a

(1) [1945] N.I. 70. (2) [1931] A.C. 1.

considerable variety and are often quite complex in their make-up. And further, it must, I think, be admitted that the law of contributory negligence, notwithstanding the attention it has received from many eminent jurists, still remains obscure at certain points. Its haphazard development and the change in accident conditions may serve to explain this. Liability for negligence, whatever the reason, did not become determinable at common law by reference solely to responsibility for producing a situation of danger. Where that situation occupies a period, rather than a point in time, the investigation is continued inside the period so as to ascertain, if possible, "the decisive and immediate cause." With the increasing speed of vehicular traffic this process has become more difficult and has led to hardship. How far the Law Reform (Contributory Negligence) Act, 1945, will improve the position in Great Britain remains to be seen. In this jurisdiction the determination of responsibility still involves the application of principles perhaps better suited to a more leisurely age. The donkey in *Davies v. Mann* (1) died over a century ago but its ghost rallies yet to the aid of those, particularly pedestrians, who suffer in street accidents.

Before coming to the questions it will be well to make the following comment. They are not to be regarded as constituting a universal formula apt to ascertain responsibility in all cases. On the other hand, they should operate, where applicable, to fix responsibility irrespective of mere procedural or accidental circumstances, as, for example, which party has become plaintiff, or whether the defendant has counterclaimed. And, lastly, it must be kept in mind—despite the habitual use of the word "negli-" "gence" to convey several meanings—that the only kind of carelessness which can make the careless person liable in damages is that which amounts to a breach of duty.

First, then, was the defendant negligent? This question admits of little ambiguity. It means did the defendant fail in his duty to the plaintiff to take care

(1) (1842) 10 M. & W. 546.

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and, if so, was his breach of duty a contributory cause of the accident ? On the evidence I am satisfied that this first question must be answered in the affirmative. The defendant admitted that when he first saw the plaintiff the latter was "immediately in his path" and 10 to 15 feet away. He also said that the plaintiff was then about 3 feet out from the parked cars between which he had passed ; and he was unable to explain why he did not see the plaintiff earlier. I am of opinion that these distances were considerably under-estimated by the defendant and I find that he should have seen the plaintiff earlier than he did. He should have kept the carriage-way under close observation for the nature of the thoroughfare was such as to demand a sharp look-out. I appreciate that in cases of this sort one must be alert not to magnify fine points or to let the atmosphere of a court-room analysis substitute the standards of perfection for those of the reasonable man. But on the whole evidence, including that relative to the defendant's efforts to avoid the accident to which I refer later, I am unable to escape the conclusion that had the defendant been keeping a proper look-out this accident would not have occurred.

Secondly, was the plaintiff negligent ? This question I regard as asking of the plaintiff just what the first question asked of the defendant ; that is to say, was the plaintiff guilty of a breach of duty contributing to the accident ? In other words, these first two questions, as I understand them, are aimed at ascertaining if either or both of the parties have been guilty of breach of duty causing or contributing to cause the situation of danger within which the accident happened. It is, of course, elementary that a plaintiff's conduct, though not amounting to a breach of duty, may preclude him from recovering despite a finding of negligence on the part of the defendant. Whatever the theory of it may be, this will be so if the plaintiff is hurt because he fails to take reasonable care for his own safety. If A, while walking home on his own side of a country road, is run down by a motor car coming in the opposite direction on its wrong side, A cannot recover if he

might reasonably have avoided danger by scrambling on to the grass verge even though he owed no duty to the motorist to take that step. Now where the evidence is sufficient to tax a plaintiff with that kind of carelessness but insufficient to show any breach of duty on his part, responsibility will be settled by two questions—was the defendant negligent? And—could the plaintiff have avoided the accident by the exercise of reasonable care? In that event the question under consideration does not arise. But if the evidence suffices to permit a finding that the plaintiff (*a*) was guilty of a breach of duty or (*b*) was merely careless of his own safety, the question under consideration must be asked to settle (*a*). It should not, however, cover (*b*) as that is caught by the fourth question which I discuss later. See also the observations of Black J. in *Campbell v. John Kelly Ltd.* (1).

Was, then, the plaintiff guilty of a breach of the duty to take care contributing to the accident? I think he was. When emerging from between parked cars it was his duty to look out for approaching traffic. Had he looked to his right he must have seen the defendant coming towards him for the defendant was then clearly within view. The plaintiff did not see the defendant at all before the impact, and I can only conclude from this that he started to cross without looking to his right as he should have. On his behalf it was suggested that as he was over the centre of the carriageway when struck his duty then was to look to the left, as he said he was doing, and not to the right. I cannot exonerate the plaintiff on this ground. Had he looked to his right before making the crossing I am satisfied that, as a reasonable man, he would have waited until the defendant had gone past. The plaintiff may have looked about him at the corner but all the evidence goes to show that when he actually essayed the crossing of the carriageway he did not take this precaution but went over looking ahead and quite oblivious of the defendant's approach. The second question also must therefore be answered in the affirmative.

(1) [1945] N.I. 70, 97.

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Thirdly, could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence? The scope of this question is not very clearly defined in *Campbell v. John Kelly Ltd.* (1). In answering it may one reckon the negligence which has already been found in reply to the first question? In considering this it must be remembered that the third and fourth questions are only relevant to the inquiry where the circumstances of the case afford some opportunity for the taking of avoiding action *after* a situation of danger has been created by the negligence of one or both parties. This third question cannot, therefore, be regarded as a duplicate of the first. In its form, which echoes the traditional pleading, it presupposes that the plaintiff's negligence has become, so to speak, operative. It may well be, of course, that in some cases the answers to both the first and third questions will depend on circumstances which, though not identical, have some common element of negligence, for it is often quite impossible to divide a collision case into neat parcels of fact representing the succession of events. Still, the object of this question remains an examination of what the defendant might reasonably have done to meet the position indicated by the previous answers. Subject to the general limitation thus imposed by the nature of the inquiry, how far back one should go will depend on the circumstances of each case. In the present instance I think the question will be sufficiently answered by inquiring as to the defendant's conduct subsequent to his initial negligence, that is to say, *after* he had seen the plaintiff. Before proceeding to do so I should perhaps state my opinion that the view expressed is in accord with the decision of the Privy Council in *British Columbia Electric Railway Co., Ltd., v. Loach* (2). There, had the four question procedure been adopted, the answers would have been—(1) Yes (excessive speed), (2) Yes, (3) Yes (not pulling up promptly), (4) No. The third answer would have related to different negligence from that founding the first. But it would have referred to the negligence

(1) [1945] N.I. 70. (2) [1916] 1 A.C. 719.

of the Company in sending the electric car out with bad brakes and not to the conduct of the driver who did his best to pull up. That, however, does not mean that the third question should review *all* that has gone before. What it does mean, in my view, is that a defendant is not entitled to have this question resolved in his favour merely because he has previously deprived himself of the proper means of meeting an emergency he should have guarded against.

The relevant facts on this third question are somewhat out of the ordinary. When the defendant first saw the plaintiff his speed would have enabled him to pull up in some 25 feet after braking. But, though an experienced rider, he did not brake at all. This according to my note, is how he describes what he did do : " When I saw Ross I realised he did not see " me. I did not think I could go round him and " remain with the machine. That is I could not ride " round him. I did not want to hit him with machine " and I threw it away to right, i.e., in front of him. " You throw machine to right by turning handlebars " and you let yourself go. . . I could not have stopped " in that short space of time had I tried." One possible explanation of this reaction may be the defendant's surprise at seeing the plaintiff in his path when he resumed the look out he should have maintained all the time. But whatever the reason, he took the wrong course and I do not think this can be excused by " agony of the moment " considerations. It may be assumed, without imputing any fault, that the defendant travelled some distance after first seeing the plaintiff before his efforts to avoid an accident produced an effect. Be it minute or appreciable, some time lag is inevitable. There is, however, nothing to show it was too great in the defendant's case and it may be ignored. But the beginning of the mark on the road indicates where this period had ceased and where the defendant's reaction had communicated itself to the machine. On the facts the plaintiff must *then* have been at least 30 feet away—sufficiently far to enable the defendant, on his own showing, to have stopped in time had he braked. I doubt, indeed, if it

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would have been necessary for him to have braked to a standstill as the plaintiff did not falter or hesitate but walked straight across looking ahead. But, however that may be, I can entertain no doubt that had the defendant braked he could have avoided the accident and that, in the circumstances, his handling of the machine was negligent. I therefore answer the third question in the affirmative.

Fourthly, could the plaintiff by the exercise of reasonable care have avoided the consequences of the defendant's negligence ?

Generally speaking, the scope of this question will be similar to that of the third. For the reasons already advanced in considering it, I do not think the answer here can be founded merely on the plaintiff's negligence in entering the carriageway and placing himself in the path of danger as he did. That negligence has already been found in response to the second question. The object now is to ascertain if, having helped in that manner to produce the situation of danger, the plaintiff might nevertheless have avoided the accident by reasonable care.

If, when he was in a position of peril, the plaintiff had taken notice of his surroundings and had thus ceased the negligence already found, I think the question would be entirely one of fact, answerable yea or nay according to the evidence and a common sense standard of what is reasonable. But, as has been stated earlier, what actually happened was that the plaintiff continued his negligent progress oblivious of his surroundings until struck.

That being the case, Mr. Jones, for the defendant, contended that as a matter of *law* this question must be answered in the affirmative and the claim dismissed. He submitted that the plaintiff's negligence was continuing negligence and he cited from *Campbell v. John Kelly, Ltd.* (1) the passage in Murphy L.J.'s judgment, in which he says : " If a pedestrian proceeds to cross a " city street without paying any attention to on- " coming traffic, and continues to cross the street until " knocked down, it is difficult to show how and at what

(1) [1945] N.I. 70, 91.

"instant his negligence is 'spent,' but, in my opinion, "such pedestrian can only succeed in an action for "damages against the driver of the vehicle which "knocked him down (however negligent that driver "is proved to be) if he shows that he (the pedestrian) "could not have avoided the accident by the exercise "of reasonable care ; and if he continues to cross in a "negligent fashion up to the instant of impact, he "must fail in his action." I do not think the Lord Chief Justice and Black J. were prepared to go as far as that, and, indeed, it was not necessary for the decision that they should, as in that case—unlike the present—both driver and pedestrian appear not to have seen each other until the accident had become unavoidable. It is to that state of fact that the Lord Chief Justice referred when he said (1) : "I think it "can be asserted with confidence that in street accident "cases if two parties in collision, who had an unob- "structed view and opportunity of seeing and avoiding "one another, did not in fact see one another until the "accident had become unavoidable, then both were so "directly to blame and in law responsible for the "accident that neither can recover his loss from the "other."

The dictum of Murphy, L.J., however, does not stand alone. Scrutton L.J. said something very similar in *Dew v. United British Steamship Co., Ltd.* (2), and so did Greer L.J. in *Service v. Sundell* (3). I must say I find it difficult to see a logical basis for any rule to the effect that if a plaintiff's negligence continues to the moment of the accident this fourth question cannot be answered in his favour. The test is one of reasonable care. Why should persistence in a particular form of carelessness within the situation of danger necessarily mean that there is still some reasonable step open to the plaintiff which, if taken, will avert the peril ? Frequently, of course, continuous negligence will suffice to preclude recovery and there are many illustrations of that in the reports. But despite the dicta to which I have referred I think the broad current

(1) [1945] N.I. 70, 83.
(2) (1928) 98 L.J.K.B. 88, 94.
(3) (1929) 99 L.J.K.B. 55, 63.

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of authority is definitely in favour of treating this question as one of fact rather than law ; and instances of successful claimants whose negligence continued throughout are certainly not lacking. I think *Davies v. Mann* (1) qualifies as an illustration. It seems as hard to say of the plaintiff there that his negligence did not continue till the damage was done as it is to deny the relevance of the instances given by Parke B. in the course of his judgment. Then reference may be made to such cases as *Gaffney v. Dublin United Tramways Co.* (2), and *Paul v. Great Eastern Railway* (3), where the plaintiffs recovered though at fault to the last. There is also *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Company* (4), in which the House of Lords were clearly prepared to hold the *Alconda* solely responsible even on the assumption that the *Bogota*, with which she collided in the Clyde, was negligent in continuing across stream until the collision. Then there is *McLean v. Bell* (5), where the pursuer, like the present plaintiff, crossed the road without, as alleged, looking where she was going. Lord Wright's speech, which was really the judgment of the House, shows no recognition of any rule of law such as that contended for by Mr. Jones. On the contrary he says, with reference to the pursuer's crossing of the street : " She may have been negligent " in so doing, but that does not bar her claim, if the " defender, by the exercise of reasonable care and skill " (which does not mean anything superhuman or " exceptional with all allowance for what is called the " agony of the moment), could have avoided the " pursuer, even though the effect of the pursuer's " negligence, if she was negligent, continued right up " to the moment of impact." And later, when speaking of Lord Ormidale's judgment in the Second Division, he adds : " If by the word ' concurrent ' the learned " judge is referring to the fact that the pursuer's " negligence in crossing the road (if the jury found her " to be negligent in so doing) and its consequences

(1) (1842) 10 M. & W. 546.
(2) [1916] 2 I.R. 472.
(3) (1920) 36 T.L.R. 344.
(4) [1924] A.C. 406.
(5) [1932] S.C. 21 ; 48 T.L.R. 467.

"persisted up to the moment of the collision, he is, "in my judgment, seeking to apply as decisive a "matter which was not so treated as long ago as in the "classic case of *Davies v. Mann* (1), where the un- "fortunate donkey remained hobbled on the highway "till run over by the defendants. In that case, unless "the donkey had been left as it was, no accident could "have happened."

I do not think these passages from this most important speech are to be dismissed as obiter or confined strictly to the special facts of that case. In my opinion the submission now under discussion is at variance with the principles expressed in *McLean v. Bell* (2). My conclusion, therefore, is that whether or not the plaintiff's negligence persisted until the moment of impact this fourth question remains a question of fact.

Treating it as such what should the answer be? The practical question arises as to what the plaintiff could reasonably have done, once he was in the danger zone, had he then become aware of the defendant's approach. He might, no doubt, have stopped or stepped back or started to run. But would any of such courses have commended themselves to the reasonable man as likely to diminish his peril? I do not think they would. For this elderly pedestrian the time for manoeuvre was very brief and had he looked up when in the defendant's path he would, I think, have been in a real quandary to anticipate what the outcome of the defendant's manoeuvres would be or to know where safety lay. It may well be that in continuing on his way as he did he was doing—albeit unknowingly—what was best, for the pedestrian who falters or hesitates often adds to his danger. The fact that the accident happened does not mean that some other action on the plaintiff's part would have manifested a higher degree of care. Once the situation became one of danger I find myself as a juror unable to say that the plaintiff ought reasonably to have done something other than he did. In my opinion, therefore, this fourth question should be answered in the negative.

(1) (1842) 10 M. & W. 546.
(2) [1932] S.C. 21.

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This amounts to a verdict for the plaintiff and makes it unnecessary to determine whether the same result might not be reached on another ground, viz., that (irrespective of what the plaintiff might have done had he realised his danger) the defendant *knew* that the plaintiff was ignorant of his approach and could have avoided striking him had he exercised due care. That is a subject of some difficulty, though *Gaffney v. Dublin United Tramways* (1) and the judgment of Lush J. in *Paul v. Great Eastern Railway* (2) go some way to indicate that the defendant might also be liable on this ground.

There remains the question of damages. The special damage I measure at £100. There has been little loss of earning power. The injuries, however, were serious, a fractured skull and a broken leg. The plaintiff has made a good recovery, but after much pain and suffering due not only to his injuries but to a dermatitis which must be attributed to the plaster cast on his leg. He is not yet, and may never be, the man he was. He suffers from arthritis of the knee joints which he did not experience before. I doubt if this is entirely due to the accident. But it may well have been hastened by it. On the whole case I think £650 will be a reasonable measure of compensation. The plaintiff will have judgment accordingly with costs.

Judgment for the plaintiff.

Solicitor for the plaintiff : *James Boston.*
Solicitor for the defendant : *Henry J. Catchpole.*

(1) [1916] 2 I.R. 472.
(2) (1920) 36 T.L.R. 344.

M. V. P.

TEASE v. COLL AND OTHERS (1).

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Feb. 17, 28.

Licensing Acts—Prosecutions for unlawfully allowing intoxicating liquors to be consumed on licensed premises during prohibited hours and unlawfully being on licensed premises during prohibited hours—What are prohibited hours—Refreshment Houses (Ireland) Act, 1860 (23 & 24 *Vict., c.* 107), *section* 43—*Licensing Act*, 1872 (35 & 36 *Vict., c.* 94), *section* 78—*Licensing Act (Ireland)*, 1874 (37 & 38 *Vict., c.* 69), *section* 27—*Intoxicating Liquor Act (Northern Ireland)*, 1923 (13 & 14 *Geo.* 5, *c.* 12), *section* 7 (1), *Second Schedule, Part I*, 1.

(1) In the King's Bench Division before Babington L.J. and MacDermott J.

C. was a publican and the proprietor of licensed premises in a town in respect of which section 78 of the Licensing Act, 1872, had amended the closing hour of licensed premises from 11 p.m. as formerly provided by the Refreshment Houses (Ireland) Act, 1860, section 43, to 10 p.m. Section 78 of the Licensing Act, 1872, further provided that " any person who sells or exposes for sale, or " opens or keeps open any premises for the sale of, intoxicating " liquors at any other times than those limited for such purpose " by [the Act of 1860] as the same is amended by this section, or " during such times as aforesaid allows any intoxicating liquors to " be consumed on such premises " should be liable to a penalty. Paragraph 1 of Part I of the Second Schedule to the Intoxicating Liquor Act (Northern Ireland), 1923, in its application to this class of premises provided : " Notwithstanding anything in any enactment " it shall not be lawful for any person to sell, or expose for sale, " intoxicating liquor, or to open or keep open any premises for " the sale of intoxicating liquor, (whether for, consumption on or off " the premises) at or during any hours on week days except the " following, that is to say : the hours . . . ending not later than " nine at night."

Three customers entered C.'s licensed premises before the hour of 9 p.m. and ordered alcoholic liquor which was delivered to them and paid for by them before that hour ; but thereafter the three customers continued on the premises, and part of the liquor thus previously purchased was consumed by them between the hours of 9 p.m. and 10 p.m.

C. was prosecuted under section 78 of the Licensing Act, 1872, for unlawfully allowing intoxicating liquors to be consumed on licensed premises during prohibited hours, and the three customers were prosecuted under section 27 of the Licensing Act (Ireland),

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1874, for unlawfully being on licensed premises during prohibited hours.

It was contended on behalf of all the defendants that the effect of paragraph 1 of Part I of the Second Schedule to the Act of 1923 was to alter the prohibited hour from 10 p.m. to 9 p.m. only in the cases of the four offences specified in that paragraph, and as the offence of allowing liquor to be consumed outside prohibited hours was not an offence so specified it continued to be governed by the Act of 1872 in which the prohibited hours commence at 10 p.m.

Held, that the effect of the Act of 1923 was to amend section 78 of the Act of 1872 by substituting new prohibited hours in respect of all matters specified in that section; and that the combined effect of the two enactments was to make it an offence to allow liquor to be consumed on licensed premises after the hour of 9 p.m.

CASES STATED by the resident magistrate sitting at Cookstown Petty Sessions.

The respondent Patrick Coll, a person licensed to sell intoxicating liquor by retail at licensed premises at Loy Street, Cookstown, was prosecuted by the appellant at Cookstown Petty Sessions on the 25th October, 1946, under section 78 of the Licensing Act, 1872, on a summons containing five charges, namely, that on the 28th September, 1946, during prohibited hours he did (i) unlawfully sell intoxicating liquors; (ii) unlawfully expose for sale intoxicating liquors; (iii) unlawfully open licensed premises for the sale of intoxicating liquors; (iv) unlawfully keep open licensed premises for the sale of intoxicating liquors; (v) unlawfully allow intoxicating liquors to be consumed on such premises.

At the same court the respondents Thomas Hagan, Donald Hughes and Thomas Hamilton were prosecuted by the appellant under section 27 of the Licensing Act (Ireland), 1874, for unlawfully being on licensed premises during prohibited hours.

The facts found by the resident magistrate were that the respondents Hagan, Hughes and Hamilton entered the licensed premises on the day in question before the closing hour of 9 p.m., and each then ordered a number of bottles of stout. These bottles of stout were brought uncorked to these respondents in a room on the licensed premises, and the delivery

and payment therefor was made before the hour of 9 p.m. Each of these respondents consumed part of the stout on the licensed premises between the hours of 9 p.m. and 10 p.m. The bar of the licensed premises was closed at 9 p.m., and no alcoholic liquor was sold or exposed for sale after 9 p.m. No alcoholic liquor was consumed on the premises by any of the respondents Hagan, Hughes and Hamilton after 10 p.m.

It was contended before the resident magistrate on behalf of the respondent Patrick Coll that there was no evidence to support the first four charges in the summons against him, and the resident magistrate so found. On the fifth charge it was contended that the prohibited hours for the consumption of alcoholic liquors on licensed premises commenced at 10 p.m. as prescribed by section 78 of the Licensing Act, 1872; and that the Second Schedule to the Intoxicating Liquor Act (Northern Ireland), 1923, which curtailed the hours during which licensed premises could be kept open made no reference to the offence of allowing intoxicating liquors to be consumed on the premises during prohibited hours, and the resident magistrate accepted this contention. The resident magistrate accordingly dismissed all five charges in the summons against the respondent Patrick Coll, and likewise dismissed the summonses against the respondents Hagan, Hughes and Hamilton for being unlawfully on the licensed premises during prohibited hours.

The appellant applied to the resident magistrate to state a case on each summons, and the four Cases Stated were heard together.

Nicholson K.C. and *Harrison* for the appellant. There is nothing in any of the Licensing Acts to take away the offence of allowing consumption on the premises. The offence stands until repealed.

The Intoxicating Liquor Act (Northern Ireland), 1923, and the Acts prior to that Act did not affect the offence of allowing consumption and the penalty therefor. The Act of 1923 has amended the Act of 1872. The time of 9 o'clock has been fixed as the closing time, and that time of 9 o'clock becomes "the time as

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"aforesaid" within the Act of 1872. It is submitted that the operation of the Act of 1923 is simply the engrafting of the new time on the 1872 Act. It is of some materiality to look at the words "notwithstanding anything in any enactment" contained in paragraph 1 of the Second Schedule to the 1923 Act. This shows that the effect of the 1923 Act is to fix new hours which become the "times as aforesaid" in the earlier Act. [They referred to *Rowan v. Downing* (1) and *Caldwell v. Jones* (2).]

Agnew for the respondents. The rule is laid down in Maxwell, The Interpretation of Statutes, that a statute is the will of the legislature, and that the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that made it." If the words of a statute are precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense. In such a case the words themselves best declare the intention of the legislature.

In the present case the words under consideration are clear and unambiguous. The distinction is fundamental between the fifth charge of unlawfully allowing intoxicating liquors to be consumed on the premises during prohibited hours and the other four charges. The appellant must show that although the legislature does not mention the offence charged in the fifth charge, yet it is included.

Section 78 of the Act of 1872 is the section which creates the offence. That section is not referred to in any section of any other Act. The appellant must show where the offence comes from, and he must ask the Court to hold that section 78 relates to five offences and not to four. The time that is fixed for allowing consumption is left untouched by the later Act. It would have been an easy matter for the Act of 1923 to have included specifically the offence of allowing intoxicating liquor to be consumed on the premises during prohibited hours if that had been intended.

(1) [1909] 2 I.R. 626.
(2) [1923] 2 K.B. 309.

If the matter is one of doubt the benefit of the doubt must be given to the respondents.

Cur. adv. vult.

BABINGTON L.J. read the following judgment of the Court (Babington L.J. and MacDermott J.):

These four Cases Stated by Mr. William Miller, Resident Magistrate, sitting in the Petty Sessions District of Cookstown, all arise out of the same facts and raise the same question of law as to which the opinion of this Court is sought.

The defendant and respondent, Patrick Coll, is a publican in Cookstown, a town in which licensed premises are by law required to close at 9 p.m. Between that hour and 10 o'clock p.m., on Saturday, the 28th September, 1946, the other three defendants were found on Patrick Coll's licensed premises drinking intoxicating liquors.

Patrick Coll was prosecuted by the complainant under section 78 of the Licensing Act, 1872, on the five counts of—(1) unlawfully selling, (2) unlawfully exposing for sale, (3) unlawfully opening and (4) unlawfully keeping open licensed premises for the sale of intoxicating liquor, and (5) unlawfully allowing intoxicating liquor to be consumed on his premises during prohibited hours. The other three defendants were prosecuted under section 27 of the Licensing Act (Ireland), 1874, for unlawfully being on the licensed premises during prohibited hours.

The resident magistrate found that Patrick Coll had not sold or exposed for sale any intoxicating liquor or opened or kept open his premises for the sale of intoxicating liquor as alleged, and these findings were not challenged before us. He also found that drink had been consumed on the premises between the hours of 9 and 10 o'clock, but being of the opinion that consumption before 10 p.m. was not an offence under section 78 of the Licensing Act, 1872, he dismissed all four cases and reserved the question as to whether he was right in law in so holding for this Court.

This question turns on the effect of the Intoxicating Liquor (Northern Ireland) Act, 1923, which curtailed

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the hours during which licensed premises may be kept open, upon the provisions of section 78 of the Act of 1872.

Under the Refreshment Houses (Ireland) Act, 1860, section 43, 11 p.m. was the relevant hour of closing. This was amended by the first paragraph of section 78 of the Licensing Act, 1872, under which 10 p.m. became the closing hour. Section 78 then proceeded to enact the five offences already mentioned in the following terms :—

> "Any person who sells or exposes for sale, or opens "or keeps open any premises for the sale of, in- "toxicating liquors at any other times than those "limited for such purpose by section forty-three "of the Act passed in the session of Parliament held "in the twenty-third and twenty-fourth years of "the reign of Her present Majesty, chapter one "hundred and seven, as the same is amended by "this section, or during such times as aforesaid "allows any intoxicating liquors to be consumed on "such premises, shall for the first offence be liable "to a penalty not exceeding ten pounds, and for "any subsequent offence to a penalty not exceeding "twenty pounds."

It was not disputed that the summonses against Coll were laid under this section.

The hours of opening were altered in several respects, not now material, by the Licensing (Ireland) Act, 1905, and the Intoxicating Liquors (Ireland) Act, 1906, and those Acts were repealed by the Intoxicating Liquor Act (Northern Ireland), 1923, which prescribes the permitted hours for trading now in force.

Section 7 (1) of that Act provides that :—

> "The law relating to the sale and supply of "intoxicating liquor by retail, and to the conduct "of persons on premises licensed for those pur- "poses, shall be amended and extended by the "provisions set out in Part I of the Second "Schedule to this Act."

On turning to that part of the Schedule which deals with closing hours it is to be observed that it does not expressly repeal or amend the material portion of

section 78 of the Act of 1872 but, as it were, restates, in relation to the altered hours, the first four offences, with no mention of the fifth.

The relevant portion of the Schedule is that part of paragraph 1 which reads :—

"Notwithstanding anything in any enactment it "shall not be lawful for any person to sell, or expose "for sale, intoxicating liquor, or to open or keep "open any premises for the sale of intoxicating "liquor, (whether for consumption on or off the "premises) at or during any hours on week-days "except the following, that is say: the hours "beginning not earlier than ten in the morning and "ending not later than nine at night."

It was argued that the effect of this provision is only to modify the hours of closing specified in section 78 of the Act of 1872 in relation to the first four offences, and that as the offence of allowing consumption is not mentioned in the Schedule, the hours in relation to it are still as enacted in section 78 of the Act of 1872. If this contention be sound it follows that consumption is still permissible up to 10 p.m., and not merely up to 9 p.m., when the premises must be closed under the provisions in the Schedule.

Section 7 and paragraph 1 of the Second Schedule to the Act of 1923, when read together, alter the law in a very awkward and clumsy manner, but we have to construe them so as to give effect to the intention of Parliament if this is possible.

Paragraph 1 undoubtedly operates to modify the prohibited hours as specified in the first part of section 78 of the Act of 1872, which, it is to be observed, only mentions (like paragraph 1) the first four prohibited matters, viz., selling, exposing for sale, opening and keeping open ; and the real question is whether this paragraph is to be regarded as a new and substantive enactment impliedly repealing the first part of section 78 in so far as it is inconsistent therewith, or merely as an *amendment* substituting the new times for those of 1872.

We are of opinion that Parliament intended section 7 and paragraph 1 of the Second Schedule to the Act of

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1923 to be an amendment of section 78 for the following reasons. In the first place the Act of 1923 contains no appropriate penal provisions in respect of the four prohibitions specified in paragraph 1 of its Second Schedule. For dealing with any breach of these the third paragraph of section 78 must still be invoked. But that can only be done by reference to what section 78 prohibits and section 78 will contain no effective prohibition if its head is cut off, so to speak, by an implied repeal of its first part. On the other hand, if that part is not repealed but amended so as to incorporate the new closing hours the penal provisions of this section will still have something to work upon. Secondly, the Act of 1923 expressly repealed the last portion of section 78. This repeal, though not in itself now material, makes it difficult to think that the first part of the section would not have been similarly repealed were the view we have rejected sound. And lastly, the contention which was advanced on behalf of the respondents and accepted by the learned resident magistrate would, if well founded, not only create a highly anomalous situation but would, for obvious reasons, make enforcement much more difficult. The general intention of the Act of 1923 was clearly towards a stricter control of licensed premises and an interpretation leading in the opposite direction should not be preferred if an alternative exists which accords with that general intention and is no less sound from the point of view of the principles of construction.

It follows from what we have said that the words "or during such times as aforesaid allows any in- "toxicating liquors to be consumed on such premises" in section 78 must be read as referring to the new and not to the old hours.

The resident magistrate was therefore in error in dismissing the charge against Patrick Coll, the publican, for unlawfully allowing intoxicating liquor to be consumed on his premises in Cookstown between 9 and 10 p.m., on the 28th day of September, 1946, and the charges against the three other defendants of being unlawfully on the premises during prohibited hours, and the cases will go back to him with directions to convict on these counts.

Having regard to the fact that this question arises on a statute of general application we will make no order as to costs.

Appeals allowed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitor for the respondents : *E. Malachy Doris.*

J. McC.

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SHEARER v. HARLAND & WOLFF, LIMITED (1).

Mar. 26, 27; April 18.

Factory Acts—Dangerous machinery—Injury to infant workman—Statutory duty not to permit young persons to operate machinery without instruction—Negligence of foreman—Common employment—Remoteness of damage—Factories Act (Northern Ireland), 1938 (2 Geo. 6, c. 23), section 22—Factories (Dangerous Machines—Training of Young Persons) Order (Northern Ireland), 1939 (S. R. & O. (N.I.), 1939, No. 54).

Section 22 of the Factories Act (Northern Ireland), 1938, prohibits a young person from operating a dangerous machine to which that section applies unless he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed, and has either received a sufficient training in work at the machine or is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

The plaintiff, a young person within the Act and employed by the defendants, was injured when assisting in the testing of a machine to which section 22 applied and in the use of which he had received no instruction. The plaintiff was placing a piece of metal in position in the machine which was being operated by a pedal controlled by a foreman-fitter who negligently operated the pedal when the plaintiff's hand was in the machine.

The plaintiff contended (*inter alia*) that the defendants were guilty of a breach of statutory duty in permitting him to work at the machine in contravention of section 22. The defendants denied any breach of statutory duty and alternatively pleaded contributory negligence. They further contended that the plaintiff himself was guilty of the same breach of statutory duty; that any failure to instruct the plaintiff in the use of the machine was the negligence of a fellow servant of the plaintiff, and accordingly the defence of common employment applied; and that the damage suffered by the plaintiff did not flow from the breach of statutory duty but from the negligence of the foreman-fitter.

Held, (i) that section 22 imposed a duty on the defendants not to permit a young person employed by them to operate the machine without such young person being properly instructed as to the dangers arising in connection with the machine and the precautions to be observed, and that the defendants had committed a breach of that duty;

(1) In the King's Bench Division before MacDermott J.

(ii) that section 22 did not impose a corresponding duty on the plaintiff not to operate the machine, and the plaintiff had accordingly committed no breach of statutory duty;

(iii) that the defence of common employment did not apply as the duty in question was not merely a statutory duty to instruct young persons in the use of the machine but a statutory duty not to permit young persons to operate the machine if such young persons had not been given the required instruction; *Cribb v. Kynoch, Ltd.* [1907] 2 K.B. 548, and *Young v. Hoffman Manufacturing Co., Ltd.* [1907] 2 K.B. 646 distinguished;

(iv) that the plaintiff's injuries were the natural and probable consequence of the breach of statutory duty, and that the act of the foreman-fitter was not a *novus actus interveniens*.

ACTION tried before MacDermott J. without a jury.

The plaintiff, a young man aged eighteen years, suffered finger injuries while working at a guillotine machine in the factory premises occupied by his employers, the defendants. The machine was used for cutting steel plates and was operated by a pedal. When the pedal was depressed a clamping beam descended and held fast the plate while a knife descended and sheared the metal. The knife and clamping beam then ascended and the operation was complete. On the day of the accident a foreman-fitter named Kirkwood had changed a knife in the machine and wishing to test it he asked the plaintiff to assist him. The plaintiff was testing a steel plate in the machine when the foreman-fitter negligently operated the pedal and the plaintiff's fingers were crushed.

The plaintiff alleged a breach by the defendants of their common law duty to provide and maintain suitable plant, and a breach by the defendants of their statutory duty in allowing him to work at this machine in contravention of section 22 of the Factories Act (Northern Ireland), 1938 (1).

(1) By s. 22, sub-s. 1 of the Factories Act (Northern Ireland), 1938; "A young person shall not work at any machine to which this section applies, "unless he has been fully instructed as to the dangers arising in connection "with the machine and the precautions to be observed, and—

"(*a*) has received a sufficient training in work at the machine; or

"(*b*) is under adequate supervision by a person who has a thorough "knowledge and experience of the machine."

By s. 22, sub-s. 2: "This section applies to such machines as may be "prescribed by the Ministry, being machines which in its opinion are of such "a dangerous character that young persons ought not to work at them "unless the foregoing requirements are complied with."

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The learned judge found that the plaintiff's injuries were not caused by any defect in the machine, and the case is reported only on the question of breach of statutory duty.

Johnson K.C. and *Reid* for the plaintiff.

Topping K.C. and *Jones* for the defendants.

Cur. adv. vult.

MACDERMOTT J.

MACDERMOTT J. [after stating the facts and finding that the plaintiff's injuries were not caused by a defect in the machine continued :]

The second contention advanced on behalf of the plaintiff was to the effect that his injuries were caused by the defendants' breach of statutory duty in allowing the plaintiff to work at this particular machine in contravention of section 22 of the Factories Act (Northern Ireland), 1938.

The material facts and findings bearing on this branch of the case may be stated as follows :—The machine in question is of a type which has been prescribed by the Ministry of Labour under subsection (2) of section 22. See S. R. & O. (N.I.) 1939, No. 54. The section, therefore, applies to this particular machine. At the time of the accident the plaintiff was a young person within the meaning of the section. His evidence was to the effect that he had used the machine during his apprenticeship whenever he had something to cut—usually two or three times a day ; that its working was never explained to him by anyone and that he had picked it up from older apprentices and by his own observation ; that the machine was generally regarded by the apprentices as dangerous but no journey-man or person in authority had given him any instruction about it ; and that in his experience the machine was operated by two men—one to feed it and the other to press the pedal. This part of the plaintiff's evidence was not really challenged in cross-

examination and I accept it. The defendants did not seek to prove the instruction and training or supervision which, under the terms of the section, would make the prohibition it contains inapplicable. In these circumstances I have no hesitation in finding that the plaintiff had not been "fully instructed as to "the dangers arising in connection with the machine "and the precautions to be observed." I find also that it was usual for two men to operate this guillotine as the plaintiff described, and that this was a dangerous practice in that it was likely to create a particular danger in connection with the machine, namely, the danger of the pedal being operated before the person feeding the machine was ready—the very danger in fact which this accident exemplifies. I base this finding mainly on the evidence of the defendants' plant manager, Mr. James Bryce, who impressed me as a reliable witness. According to him this machine should normally be worked by one person only. His reason for this, as I have it in my notes, ran thus: "If two operate it the pedal may be pressed before "the other feeding the machine has his hands clear." He added that the defendants had given the foremen of departments instructions that machines of this type must be operated by one man alone so as to obviate this risk. I do not doubt that the defendants did appreciate the possibility of danger arising in this way. But on the whole evidence I must find that their instructions on the subject did not percolate as far as the plaintiff. On the contrary I hold that the plaintiff, far from being forbidden to use the machine either alone or with another, was allowed to use it quite freely in the manner he described.

In permitting this I am of opinion that the defendants committed a breach of section 22. Though that section does not impose a duty on employers in express terms, it is, I think, plain that it does so as a matter of necessary implication. In the ordinary course they and they alone have control of the work and are in a position to arrange or test the instruction and training or supervision which are the conditions precedent specified by the section. See also the penal provisions

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of section 136 (1) of the same Act which point to the same direction.

The question then arises whether the plaintiff can recover in respect of this breach. In contending that he could not counsel for the defendants urged several points. First, they said that if there was a breach of section 22 on the part of the defendants in permitting the plaintiff to work at the machine there was as clear a breach on the part of the plaintiff in operating the machine. The prohibition "a young person shall "not work at any machine to which this section "applies" was, according to the argument, addressed as much to workers as to employers. I do not think this contention is sound. I cannot regard this section as imposing the same obligation on the young persons whom it is designed to protect as on those who employ them and have authority over them while at work. The case might be different were the defendants able to show a breach of duty on the part of the plaintiff under section 125 (2) in that he had "wilfully and "without reasonable cause" done something to endanger himself. The evidence, however, does not go anywhere near that. The plaintiff's conduct was neither wilful nor unreasonable. I cannot see that he was guilty of any contributory negligence or fault which would bar his claim. The accident occurred while he was engaged on a task which, I have no doubt, he regarded as part of his normal day's work. That was an erroneous view to take in the sense that in the circumstances his work should not have included such a task, but the responsibility for that must fall upon the defendants, and not the plaintiff. To hold otherwise would be to nullify the protection of the Act and ignore the trend of authority. See, for example, *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1).

Then it was said that if the defendants failed to instruct the plaintiff as they should, the omission was the negligence of a fellow servant and the doctrine of common employment was a defence. *Cribb v. Kynoch Ltd.* (2), and *Young v. Hoffman Manufacturing Co.*,

(1) [1940] A.C. 152. (2) [1907] 2 K.B. 548.

Ltd. (1), were cited in support of this proposition. Those decisions go to show that a master may delegate his duty to caution and instruct and, if good law, they mark a distinction in this respect between that obligation and certain other duties which the common law lays upon employers, such as the provision of adequate plant and materials and a safe system of working. I need not, however, deal further with this aspect of the argument as, in my opinion, the point under discussion is met by Mr. Johnson's reply to it. This was to the effect that the breach of duty relied upon by the plaintiff was not a breach of the duty to instruct but a breach of section 22. Adequate instruction may well prevent a breach of that section ; but where there is such a breach it means more than a failure to instruct. It means allowing a young person to work at a particular machine in contravention of the section. In the case of a breach of such a statutory duty the doctrine of common employment is inapplicable. See *Groves v. Lord Wimborne* (2); *David v. Britannic Merthyr Coal Co.* (3). I hold, then, that this second contention of the defendants fails.

Their third point was that the damage did not flow from any breach of section 22. As a cause, it was said, that was too remote, the direct and immediate cause being the negligence of Kirkwood, the foreman. This is really a plea of *novus actus interveniens.* It is, I think, beyond question that Kirkwood's negligence was the direct and immediate cause of the plaintiff's injuries. But whether this precludes the plaintiff from ascribing the damage he has suffered to the defendant's breach of statutory duty depends, in my opinion, on whether the defendants ought to have anticipated this kind of accident as a natural and probable consequence of their breach of section 22. See *Haynes v. Harwood* (4). On the evidence this test must, in my view, go against the defendants. " Full instruction as to the dangers " arising in connection with the machine and the " precautions to be observed " would have warned the plaintiff of the danger of working this machine other-

(1) [1907] 2 K.B. 646.
(2) [1898] 2 Q.B. 402.
(3) [1909] 2 K.B. 146.
(4) [1935] 1 K.B. 146.

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wise than alone—of, in fact, the very risk of which he was the victim. The defendants appreciated that risk before the accident happened, and that being so I think they ought reasonably to have foreseen what happened as a likely result of letting the plaintiff work at this machine without due instruction. I accordingly hold that Kirkwood's negligence did not break "the chain of causation" between the breach of statutory duty and the plaintiff's injuries and that the plaintiff is entitled to recover.

This result might, I think, be reached on another ground which I will refer to shortly as it was the subject of debate though not raised expressly in the pleadings. The accident was caused by the negligence of the defendants' servant Kirkwood. Can the doctrine of common employment relieve the defendants from responsibility for his negligence? Apart altogether from any question as to whether, the plaintiff being a minor, his contract of apprenticeship was, on the whole, for his benefit, I am of opinion that on the facts of this case the doctrine is inapplicable. It rests upon an implied term of the contract of service. In *Holdman v. Hamlyn* (1) du Parcq L.J. (as he then was) said: "The true rule is that a worker, paid or unpaid, "who has agreed to serve a master, is to be deemed to "to have undertaken the risk of the negligence of "those working with him in that service, provided "that neither (i) the terms of the express contract, nor "(ii) the facts of the case, exclude the possibility of "implying such an undertaking." I respectfully agree with that statement of the law. Assuming that some such undertaking is to be read into the plaintiff's contract, can it be said to extend to a risk incidental to an operation which by law the plaintiff could not be asked to perform? I do not think it can. The circumstances, in my view, definitely negative any undertaking to accept such a risk. What the law implies must recognise what the law allows.

There remains the measure of compensation. The plaintiff's injuries have caused him the loss of the top joints of two fingers of the right hand and of one of the

(1) [1943] K.B. 664, 669.

left hand. His grip is not seriously affected but he has suffered a permanent impairment of the sense of touch and there is some disfigurement, particularly in respect of one of the stumps. He has lost a substantial amount in wages, but I think he might have sought re-employment earlier. Taking everything into account and allowing for certain weekly payments made by the defendants under the Workmen's Compensation Acts, I fix the damages at £375. There will be judgment for this sum with costs.

Judgment for plaintiff.

Solicitors for the plaintiff : *Desmond P. Marrinan.*

Solicitors for the defendants : *C. & H. Jefferson.*

M. V. P.

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REX v. THOMAS EDWARD STEPHENSON (1).

Jan. 30, 31; Feb. 1, 28.

Criminal law — Evidence — Dying declaration — Admissibility — Declaration procured by interrogation of deceased—Evidence of accomplices—Corroboration—Direction to jury.

The accused was convicted of the manslaughter of a girl by using an instrument to procure an abortion which resulted in the girl's death. A written statement signed by the deceased girl was admitted in evidence at the trial as a dying declaration although it appeared that the statement had been obtained by an interrogation of the deceased by a police inspector. Evidence for the prosecution was also given by C. who had knowingly taken the girl to the accused's premises in order to procure an abortion.

For the accused it was contended that the dying declaration was wrongly admitted; that the dying declaration and the evidence of C. were the testimony of accomplices, and that the jury had not been properly directed on the danger of acting on such testimony without corroboration; and that the trial judge had failed to give the jury sufficient guidance as to the nature of a dying declaration and the considerations bearing upon the weight to be attached to such declarations.

Held, (i) that a statement otherwise admissible as a dying declaration is not rendered inadmissible on the ground that it is obtained by questions put to the deceased, though that fact may affect the weight to be attached to such a declaration.

Rex v. Fitzpatrick (1910) 46 I.L.T.R. 173 followed.

(ii) that a warning to the jury of the danger of acting on the uncorroborated testimony of accomplices is not rendered nugatory by the fact that the judge does not identify by name the accomplices whose testimony should be corroborated, nor by the fact that the jury is directed that corroboration may be found in the evidence of the accused.

Quaere whether the dying declaration of an accomplice is within the rule of practice that the jury should be warned of the danger of convicting on the uncorroborated testimony of an accomplice.

(iii) that a dying declaration is testimony of an unusual character which should be scrutinised with special care and attention since such testimony cannot be tested or amplified by cross-examination; and it is the duty of the judge at the trial to impress these considerations upon the jury.

(1) In the Court of Criminal Appeal before Porter L.J., Black J. and MacDermott J.

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APPEAL against conviction and sentence.

The appellant was arraigned before Babington L.J. at the Belfast City Commission on an indictment charging him with the murder of Eileen Bowden. He was acquitted of murder but convicted of manslaughter and sentenced to six years penal servitude. He appealed to the Court of Criminal Appeal against conviction and sentence.

The facts of the case and the arguments of counsel sufficiently appear in the judgment of the Court.

McSparran K.C., *Topping K.C.* and *Kelly* for the appellant.

Sheil K.C. and *Jones* for the Crown.

Cur. adv. vult.

MACDERMOTT J.

MACDERMOTT J. read the following judgment of the Court (Porter L.J., Black J. and MacDermott J.):

At the Belfast City Commission held in October, 1946, the appellant was tried before Babington L.J. for the murder of one Eileen Bowden on or about the 28th of August of that year. The jury acquitted him of murder but found him guilty of manslaughter. He now appeals against conviction and sentence.

It is unnecessary to enter upon a detailed consideration of all the evidence adduced at the trial. For present purposes the nature of the case may be briefly summarised as follows. The deceased girl lived in Portrush, in the County of Antrim. She died on the 7th September, 1946, in the Route Hospital, Ballymoney, where she had been taken after being visited at her own home by her family doctor. A question arose on the transcript as to whether this visit took place on the 26th August or on the 1st September, 1946, but we have had an opportunity of seeing the learned trial Judge's own note of the evidence and it is quite clear from this that the date of the doctor's visit was the 1st September. The cause of death was not the subject of any conflict of testimony. The girl had been pregnant and according to the medical witnesses her death was due to septic peritonitis

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resulting from a wounding of the lower part of the womb by some instrument. The appellant is a registered druggist carrying on business at 17 Wellington Street, Belfast, an address in the vicinity of a cinema known as the Ritz. The Crown case was that the deceased had been taken to the appellant's premises on the 28th August, 1946, by a young man named George Cochrane, with whom she had been keeping company, for the purpose of being relieved of her pregnancy, and that the appellant had then used an instrument upon her with that object and so had caused the condition which led to her death.

In the course of the trial the prosecution tendered a statement made by the deceased to the police, in the absence of the appellant, on the 5th September in the Route Hospital. This statement was submitted as a valid dying declaration. Counsel for the appellant having objected to its reception, the learned judge directed the jury to retire and heard the evidence of those present when the statement was made, namely, Dr. W. H. Belford, District-Inspector J. R. Gorman and Sergeant W. R. W. McDowell. Having heard counsel he then ruled the statement admissible and it was subsequently read to the jury. Its terms are as follows :—

> "I, Eileen Bowden, of Portrush, having the fear "of death before me and being without hope of "recovery, make the following statement :—
>
> "I went to Belfast in a car with my own friend, "George Cochrane, to a shop. It was a druggist "shop beside the Ritz Picture House. The man "used an instrument on me. George was outside. "The man seemed to use chloroform as I knew "nothing. I bled on the way out to the car and "on the way home. The man was a chemist.
>
> "EILEEN BOWDEN."

The first ground of appeal for our consideration is that this declaration was wrongly admitted. The statement was written out by Sergeant McDowell and signed by the girl. It was not suggested that the introductory portion followed the precise language she used. But there was abundant evidence to justify

the conclusion that the girl was then dying and that she knew this and had no hope of recovery. The evidence was also amply sufficient to show that the deceased, though physically weak, was mentally clear at the time and that the body of the statement, while not including anything said to the deceased, was a fair report of what she herself had said.

In the circumstances the learned judge was clearly entitled to regard the ordinary conditions precedent to the admissibility of a dying declaration as duly satisfied. The evidence, however, disclosed that much of this statement was made in response to questions put to the deceased by the District-Inspector, and the appellant's counsel urged that this sufficed to render the declaration inadmissible. The nature of the interview which resulted in the recording and signing of this statement will appear sufficiently from the following extracts from the transcript of the District-Inspector's evidence :

(Direct examination)—

"*Q*.770. Give an example of the questions, "Mr. Gorman ?

"*A*. She started off, 'I went to Belfast in a car "'with my own friend,' and I then asked her who "was her own friend, and she said 'George "Cochrane'; and I asked her where did she go, "and she said to a shop; and I asked her what "sort of a shop was it, and she said it was a "druggist's shop. I then said, 'Where ?' and "she said, 'Beside the Ritz Cinema.' I asked her "what happened there. She said, 'A man used "'an instrument on me.' I asked her where was "George. 'George was outside,' she said. Then "I asked her if she could remember, I think I "asked her if she could remember anything else "about what happened in the shop, and she said "the man seemed to use chloroform. And I "asked her how did she know, and she answered, "'Because I knew nothing.' I then asked her "what happened afterwards. I asked her if she "bled as a result of this instrumentation, and she "said she bled on the way out, and in the car "going home."

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(Cross-examination)—

"*QA*791. When you asked her who was the man "who had used an instrument, she did not give "his name ?

"*A*. No, she said he was a chemist.

"*QA*792. I put it to you, you asked that girl the "name of this man ? *A*. I don't remember "doing so."

"*QA*793. Well, I put it to you that you did. "If you were keen on your job, and I'm quite sure "you were, District-Inspector, wasn't it the "obvious question to ask, 'Who was this man ?'

"*A*. I did ask that question.

"*QA*794. And you were satisfied when she said, "'A chemist' ? *A*. I wasn't satisfied.

"*QA*795. If you were not satisfied, didn't you "go on and ask who he was ? *A*. I didn't at "the time, or at any other time that I can "remember.

"*QA*796. Wasn't it the obvious thing to do ?

"*A*. I rather agree that it was. She made that "reply, and I didn't want to pursue it any longer.

"*QA*797. Why ? *A*. Because the girl was in a "dying condition, and was weak."

It is but right to say that it was not suggested that the District-Inspector made any attempt to lead the dying girl to any particular answer or to do more than ascertain the truth. The question, however, remains whether a statement produced by interrogation in this manner can be regarded as a good dying declaration.

Mr. Topping for the appellant relied upon two reported decisions. The first was that of Cave J. in 1892 in *Reg. v. Mitchell* (1). There the prisoner was charged with the murder of a woman whose death was alleged to have been due to an illegal operation. The prosecution tendered as a dying declaration a statement made by the deceased woman in the presence of a magistrate who put questions to her, the answers being recorded in writing by the magistrate's clerk. Cave, J. rejected the statement as a dying declaration on two grounds. The second of these he expressed thus :

(1) (1892) 17 Cox C. C. 503.

" I do not think that the statement contains sufficiently " the actual words of the dying woman. In such case " her answers, even if taken word for word, seem to " me to be useless without the questions to which they " were answers, and when a person is in such a con- " dition the danger arising from leading questions is " enormously increased." The other decision was that in *Rex v. Smith* (1), where Bruce J., following *Reg. v. Mitchell* (2) refused to admit as a dying declaration a statement made in answer to questions not taken down. These decisions mark a departure from the earlier authorities. In *Rex v. Fagent* (3), a dying declaration was received in evidence by Gaselee J. at Kingston Assizes in April, 1835, notwithstanding that it was elicited by questions put to the deceased by her medical attendant. In 1865 in *Reg. v. Smith* (4), the point was considered by the Court for Crown Cases Reserved. In that case the statement tendered as a dying declaration had been obtained by means of questions, some of them described as leading. On objection to its admissibility Montague Smith J., the trial judge, had received the evidence stating that the manner in which the statement was taken might properly be considered by the jury in estimating the effect of the evidence. The Court, consisting of Erle C.J., Channell B., Blackburn, Mellor and Montague Smith JJ., held that the declaration was properly admitted. In *Rex v. Bottomley* (5) Lawrance J. dissented from *Reg. v. Mitchell* (2). So do the learned authors of the article on Criminal Law and Procedure in the Hailsham edition of Halsbury's Laws of England, Vol. IX, 452, where it is stated : " It is no objection to the admissi- " bility of a dying declaration that it is made in answer " to leading questions, though that fact may affect its " weight as evidence." Turning to Ireland we find that in Hayes' Criminal Law, 2nd Ed. (1842), Vol. 1, 229, the law is stated as follows : " It is no objection to a " dying declaration, that it has been elicited by " questions put to the deceased ; and indeed, in all

(1) (1901) 17 T.L.R. 522.
(2) (1892) 17 Cox C. C. 503.
(3) (1835) 7 C. & P. 238.
(4) (1865) Le. & Ca. 606.
(5) (1903) 115 L.T.Jo. 88.

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"such cases, it would be advisable that the magistrate, "medical attendant, clergyman, or other discreet and "intelligent person who may be with the deceased, "should put questions to him, as well for the purpose "of ascertaining exactly his own sense of his awful "situation and his notions of a future state, as all the "circumstances with respect to the cause or manner "of his death, and by whom brought about, and "whether any provocation was offered by him." The authority quoted in support of the first part of this passage is *Rex v. Fagent* (1). In 1910 the point was considered by the Court for Crown Cases Reserved in Ireland in *Rex v. Fitzpatrick* (2). In that case the statement was taken down by a police sergeant who asked the deceased questions regarding his hope of recovery but not concerning the body of his statement. The declaration was objected to on the ground that it was preceded by questions. The unanimous judgment of the Court, which consisted of Palles C.B., Gibson, Madden, Kenny and Boyd JJ., was to the effect that the Court entertained no doubt as to the admissibility of the statement. It was delivered by Palles C.B. who is reported as saying that : "For himself he was quite "prepared to decide that neither upon principle nor "upon authority could it be held that a dying declara- "tion was inadmissible only because it was cast in "narrative form, although it has been given in answer "to questions put." And later that : "He had always "regarded it as a settled rule of practice that the fact "that a declaration was based on answers to questions "went to the weight but never to the admissibility of "the evidence. All the authorities were in favour of "the admission of this document, and he did not think "it was necessary to consider whether the preliminary "part was to be treated as part of the declaration."

This Court is of opinion that the law is correctly stated by the Chief Baron in these passages and also in the passage from Hailsham above cited. We hold, accordingly, that the dying declaration of Eileen Bowden was properly admitted.

The remaining points taken on behalf of the appellant

(1) (1835) 7 C. & P. 238. (2) (1910) 46 I.L.T.R. 173.

challenged the sufficiency of the learned Judge's charge to the jury. First of all it was contended that the deceased girl and Cochrane were accomplices and that the charge did not give an adequate warning as to the danger of acting on their evidence. This point was not expressly raised in the notice of appeal but it was debated before us without objection and we propose to consider it.

The general rule was thus stated in *Rex v. Baskerville* (1) : " It has long been a rule of practice at common " law for the judge to warn the jury of the danger of " convicting a prisoner on the uncorroborated testimony " of an accomplice or accomplices, and, in the dis- " cretion of the judge, to advise them not to convict " upon such evidence ; but the judge should point out " to the jury that it is within their legal province to " convict upon such unconfirmed evidence." The required corroboration need not support the entire evidence of the accomplice. But it must corroborate that evidence in some material particular and so as to implicate the accused. It is also clear that the prisoner's own evidence may supply the necessary corroboration. *Rex v. Medcraft* (2). It is for the judge to decide whether there is evidence capable of supplying the requisite corroboration. But if there is, it is for the jury to accept or reject such evidence, and, accordingly, the warning should be given whether or not there is corroborative evidence. See also *Rex v. Mahomed Farid* (3).

The absence of any warning in accordance with the rule must lead, so far as this Court is concerned, to a strict scrutiny of the evidence placed before the jury. But it is not necessarily enough to vitiate a conviction. " Where there is substantial corroboration, this Court " will not interfere with the verdict of a jury because " there has been in the summing-up no specific warning " about the danger of acting upon the uncorroborated " testimony of an accomplice." *Rex v. Moore* (4). See also *Rex v. Savory* (5), and *Rex v. Garland* (6).

(1) [1916] 2 K.B. 658, 663.
(2) (1931) 23 Cr. App. R. 116.
(3) (1945) 30 Cr. App. R. 168.
(4) (1942) 28 Cr. App. R. 111, 115.
(5) (1942) 29 Cr. App. R. 1.
(6) (1943) 29 Cr. App. R. 46.

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In the present case the learned judge did caution the jury about the evidence of accomplices in the following terms :—

" I now come to the facts. The first thing I wish " to say to you is this, that you have got to be " careful about the evidence here, because on the " evidence I think it is open to the suggestion that " these parties were accomplices—that is if the case " for the Crown is true—accomplices in procuring " the abortion of this girl—which, of course, was a " criminal offence ; and therefore—though it is not " absolutely necessary that you require corroboration " of the story that is told you by the witnesses for " the Crown—it is unsafe as a rule to act upon the " evidence of accomplices unless you have cor- " roboration."

In the circumstances we do not regard this caution as amounting to a misdirection, though it would have been better had those to whom the caution related been identified by name. We can entertain no doubt, however, that the jury understood that Cochrane was referred to, and, reading the charge as a whole, we think it would be difficult for them not to regard the deceased girl, for the purpose of this warning, as an accomplice as well. Of course, neither the girl nor Cochrane had any idea of taking part in the particular crime for which the appellant was on trial. But the learned judge was speaking of accomplices in the crime of procuring an abortion and we think, on the trend of the authorities, that he was correct in taking that wider view. It was, however, to the passage following the caution that counsel for the appellant directed most criticism on this aspect of the case. This passage reads thus in the transcript :—

" In this particular case, as I will point out to you " in a moment, though it is necessary for me to give " you that warning this question of corroboration is " not perhaps a very important one, because the " evidence is so interwoven as between the witnesses " for the Crown and the witnesses for the defence " that I think you may be able to discover the truth " by putting the two stories side by side and con- " trasting them"

The effect of this passage, it was said, was to reduce or water down the warning which had been given. We think this submission would be well founded had the appellant not given the evidence he did. But when the entire evidence is regarded we are of opinion that these additional observations on the question of corroboration afford no material ground for complaint. A judge is justified in commenting upon the weight and character of corroborative evidence, which may vary greatly. In this case when the entire charge is considered, it is clear that the learned judge thought fit to direct attention of the jury to the extent to which the Crown case was corroborated by the appellant's evidence. We think this was a proper course to take in the circumstances. When the case for the Crown closed there was positive medical evidence relating the death directly to an illegal instrumentation. But, apart from the finding by the police in the appellant's consulting-room of certain blood stained articles, the appellant was implicated mainly by the evidence of Cochrane and the statement of the deceased. Cochrane had undoubtedly brought the deceased to the appellant's premises on the evening of the 28th August with a view to getting the girl relieved of her pregnancy. He said the appellant suggested that they (Cochrane and Eileen Bowden) should go out and have tea and come back later; that they did so and on their return were admitted to the premises by the appellant who took the deceased into his consulting room, leaving Cochrane in an adjoining waiting room; and that when later he was admitted to the consulting room there ensued a conversation between the appellant and the girl relating to her anticipated miscarriage. Cochrane deposed to certain other matters (such as the time and the payment to the appellant of a sum of £3) which were not admitted and rested on his testimony alone. But in its substance the evidence of this witness, to the extent summarised above, was admitted by the appellant when he entered the witness box. Though he maintained he had not used an instrument upon the deceased he agreed that she and Cochrane had come to his shop pursuant to a previous arrange-

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ment; that he had taken the girl into his consulting room; that she had indicated her desire to be relieved of her pregnancy; that he had examined her private parts and had extracted therefrom a male catheter which he had wiped and put into the drawer in which it was found with other similar articles; and that she had subsequently questioned him about the miscarriage which he thought was likely. That was cogent corroboration of much in Cochrane's evidence and of several material parts of the deceased's statement. In the face of it we cannot resist the conclusion that the jury would certainly have reached the same finding even if the learned judge had named the accomplices and his caution had not been susceptible of any criticism. We, therefore, consider that the point under discussion does not, in itself, suffice to jeopardise the verdict.

Before leaving this matter we wish to add, to avoid misunderstanding, that, having assumed that the deceased girl's statement fell to be treated as the evidence of an accomplice produced as a witness for the prosecution, we find it unnecessary to decide whether the dying declaration of one who may be an accomplice comes within the rule of practice to which we have referred. That it does, appears to have been submitted on behalf of the prisoner in *Rex v. Perry* (1), but the judgment does not deal with the submission. In the course of the argument before us it was suggested that the circumstances of a dying declaration negatived the considerations which are usually regarded as the basis of the rule, namely, hope of favour and lack of credibility. *Tinckler's Case* (2) was cited by counsel for the Crown in support of this view. We doubt if it is a conclusive authority and think it best to keep the point open until it is necessary to settle it.

The remaining objection to the charge was that the learned judge failed to give the jury any adequate guidance as to the nature of a dying declaration, or as to the considerations which they ought to bear in mind in scrutinising and endeavouring to assess the

(1) (1909) 2 Cr. App. R. 267, 269.

(2) 1 East. P. C. 354.

credibility and weight of such a declaration, or as to the weight to be given to the declaration in the present case. At the trial counsel for the prisoner commented at some length, in his address to the jury, on what he submitted were the weaknesses of this evidence, while counsel for the Crown urged its reliability. In his charge the learned judge left the jury to choose between the story told by the deceased and that sworn to by the appellant. But he said little or nothing as to the peculiarities of a dying declaration or the circumstances bearing upon the weight of that made by Eileen Bowden.

The function of a judge in charging a jury in a criminal case is not limited to explaining the issues or expounding the law. As Channell J. said in delivering the judgment of the English Court of Criminal Appeal in *Rex v. Cohen & Bateman* (1): "A judge is not "only entitled, but ought, to give the jury some "assistance on questions of fact as well as on questions "of law. Of course, questions of fact are for the "jury and not for the judge, yet the judge has ex- "perience on the bearing of evidence, and in dealing "with the relevancy of questions of fact, and it is "therefore right that the jury should have the assist- "ance of the judge."

This does not mean that it is the duty of the judge to analyse and discuss every question of fact in his summing up. The extent of his duty in this respect must depend upon the circumstances of each particular case and the character of the evidence which the jury has to consider. The immediate matter for our determination, then, is whether this duty was sufficiently discharged in the present instance.

Dying declarations are admitted as exceptions to the general rule against hearsay. They occur but occasionally in the experience of lawyers—perhaps less frequently now than before the Legislature made provision for the taking of bedside depositions—and even more rarely in the experience of jurors. Made in the settled, hopeless expectation of impending death, the solemnity of the occasion is regarded at

(1) (1909) 2 Cr. App. R. 197, 208.

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law as imposing a sanction equivalent to that of an oath. It cannot be said, however, that the law regards such declarations as generally superior in credibility to sworn testimony. Like evidence given in the witness box, they may be lacking in veracity or they may be lacking in accuracy. Indeed in most cases they deserve even closer scrutiny, inasmuch as the jury have no opportunity of seeing and hearing the declarant and forming their own judgment as to the declarant's reliability, and, moreover, as it can seldom happen, in the nature of things, that the accused will have been present or have had any opportunity for cross-examination. Again speaking generally, it is this lack of opportunity to test and amplify the declaration which, more than anything else, makes it desirable to weigh and ponder the evidence contained in such a declaration with special care and attention. For one of the dangers in admitting such declarations is the danger that omissions, failure to tell the whole story, or misrepresentations, even quite unintentional, or mere turns of phrase, may have the effect of giving a colour which could have been corrected by cross-examination.

We are of opinion that the learned judge ought to have informed the jury of the nature of a dying declaration sufficiently to impress these considerations upon them. We are not oblivious of the fact that the jury had before them the detailed testimony of everyone present when the declaration was made and that counsel on both sides canvassed the whole matter widely. But we think that in this case it remained for the learned judge to assist the jury in weighing this part of the evidence and in appreciating its somewhat unusual character.

The question next arises whether the inadequacy of the charge in this respect is sufficient to invalidate the conviction. It cannot be regarded as a wrong decision on a question of law and it is clear that the verdict cannot be assailed as unreasonable or not supported by the evidence other than the declaration. If the appeal against conviction is to be allowed, therefore, it must be under paragraph (*c*) of Section 3,

sub-section (1) of the Criminal Appeal (Northern Ireland) Act, 1930, on the ground that there was a miscarriage of justice. It is well settled that the test of this is whether on the whole facts and with a correct direction, the only reasonable and proper verdict would be one of guilty. *Rex v. Cohen & Bateman* (1), *Rex v. Haddy* (2), *Stirland v. Director of Public Prosecutions* (3).

Applying this test after a careful examination of the transcript, we are of opinion that there was no miscarriage of justice. Apart altogether from the dying declaration, the other evidence before the jury raised a very weighty case against the appellant. It established beyond any reasonable doubt :—(*a*) that the visit paid to the appellant's premises by Cochrane and the girl was for the purpose of procuring the latter's abortion ; (*b*) that the visit had been the subject of previous appointment ; (*c*) that the appellant's statement to the police that this was an innocent visit to obtain treatment for stomach sickness and that he gave the girl a stock mixture for which he charged 4*s*. 0*d*. was a tissue of lies ; (*d*) that the appellant took the girl into his consulting room and conducted an intimate examination in the course of which a blood-stained catheter was removed from her body, wiped by the appellant and placed in the drawer where he kept articles of that sort ; (*e*) that the visit concluded with a discussion about a likely miscarriage ; and (*f*) that four days later the girl's uterus was septic and she was in the throes of her last illness.

Indeed it is not too much to say that when the evidence had concluded the field of controversy had, for all practical purposes narrowed to a single issue—did the appellant use the catheter upon the deceased before he withdrew it ? It is unnecessary to rehearse the morbid and sordid details of the considerable body of evidence, expert and otherwise, which bore on this issue. After carefully considering and weighing all the evidence we have come to the conclusion that it would undoubtedly have led a reasonable jury to a

(1) (1909) 2 Cr. App. R. 197, 207.
(2) [1944] K.B. 442, 445.
(3) [1944] A.C. 315, 321.

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verdict of guilty even had the learned judge's charge been beyond all criticism.

For the foregoing reasons we hold that the appeal against the conviction fails and must be dismissed.

The sentence imposed was severe for a man of the appellant's years. But, having regard to the gravity of the offence, we would not be disposed to revise it merely on a review of the facts which the learned judge had before him. We acceded, however, to an application for liberty to call medical evidence, and, having heard the testimony of Dr. Brien O'Brien as to the state of the appellant's health, we think his age should receive rather more weight in the assessment of punishment. The sentence will accordingly be reduced to one of four years' penal servitude. It will run from the day from which the original sentence would have run had there been no appeal.

Conviction affirmed. Sentence reduced.

Solicitor for the appellant : *Desmond P. Marrinan.*

Solicitor for the Crown : *Assistant Chief Crown Solicitor.*

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Mar. 28.

Valuation Acts—Rating—Charity—Hereditament occupied as residence for nurses in connection with county hospital—Whether used exclusively for charitable purposes—Valuation (Ireland) Act, 1852 (15 & 16 Vict., c. 63), sections 12, 16—Valuation (Ireland) Act, 1854 (17 & 18 Vict., c. 8), section 2.

A detached dwelling-house standing in private grounds was leased to the Committee of Management of a County Hospital and used by them for the sleeping and living accommodation of part of the nursing staff employed at the Hospital. The hereditament in question was distinct from and situated some distance from the lands of the Hospital. The Committee of Management claimed to have this hereditament distinguished in the valuation list as being used exclusively by them for charitable purposes.

Held, by the Court of Appeal (Babington and Porter, L.JJ.; Black J. dissenting) that the hereditament was not used exclusively for charitable purposes.

In determining whether hereditaments are used exclusively for charitable purposes it is not permissible to look outside the hereditaments and to consider whether the user of the hereditaments can be associated with other hereditaments, the user of which is exclusively charitable.

Armagh County Infirmary Committee v. The Commissioner of Valuation for Northern Ireland [1940] N.I. 1 doubted.

Decision of the King's Bench Division (Andrews L.C.J. and MacDermott J.) reversed.

APPEAL from a decision of the King's Bench Division (Andrews L.C.J. and MacDermott J.) on a Case Stated by the County Court Judge for the County of Fermanagh pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860.

The Management Committee of the Fermanagh County Hospital appealed to the Court of Quarter Sessions for the Enniskillen Division of the County of

(1) In the Court of Appeal before Babington and Porter L.JJ. and Black J.

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Fermanagh against an entry in the valuation lists for the year 1945-46 on the ground that the hereditament known as Fort Lodge, Forthill Street, Enniskillen, occupied by the Committee should be distinguished in the valuation list as being exclusively used for charitable purposes. The county court judge allowed the appeal and held that the user of the hereditament was exclusively charitable and that the hereditament should be distinguished in the valuation list as "Exempt," but on the application of the Commissioner of Valuation for Northern Ireland he stated a case for the opinion of the High Court.

The following facts were proved or admitted before the county court judge and were set out in the Case Stated :—

The hereditament consisted of a dwelling-house, offices and grounds distinct from the Hospital lands and situated about 500 yards therefrom. The hereditament was held under a separate title from the Hospital lands, that is to say a lease of five years from the 1st May, 1945, at a rent of £130 per annum. The hereditament was solely used by the Committee for sleeping and living accommodation for a part of the nursing staff employed at the Hospital. The nurses had to sleep at the Hospital or at the hereditament and they were interchanged as the occasions of nursing duty required. All the nurses had the principal meal of the day at the Hospital. No nursing was carried on from the hereditament, but lectures to the nursing staff were occasionally given there. The nurses did not carry on any private practice in or from the hereditament. The nurses when in the hereditament remained subject to the discipline and to the hours and regulations of the Committee of Management.

The question raised in the Case Stated was whether the county court judge was right in holding that the user of the hereditament was exclusively charitable.

The King's Bench Division of the High Court (Andrews L.C.J. and MacDermott J.) affirmed the decision of the county court judge. The Commissioner of Valuation for Northern Ireland appealed from this decision to the Court of Appeal.

Curran K.C. and *Harrison* for the appellant, the Commissioner of Valuation.

The premises are being used by persons who are not themselves objects of the charity. In such cases the premises are not being used for charitable purposes. The hereditament is a separate unit of valuation from the County Hospital. The lectures which are given to the nurses in this building enable them to go into various branches of the nursing profession.

It is not admitted that even if this building were within the Hospital grounds that the use would be charitable. Even if it were inside the Hospital premises it would not be used for charitable purposes. [They referred to *Moon v. London County Council* (1).] The question of compulsion has no relevance in deciding to what use the premises are put. It is the user of the premises which must be regarded, and not the object of what is done outside. The court can only concern itself with the immediate object and purpose ; and the immediate object and purpose is the provision of accommodation for nurses. The principle accepted by the Divisional Court is unsupported by authority. That Court had in mind a hospital undertaking, whereas it should have had in mind one unit of valuation. It is difficult to understand how the alleged fact that the occupation was in the Management Committee can be a distinguishing fact. From the point of view which we are stressing the nurses are the occupiers. The principle laid down by Palles C.B. in *Commissioner of Valuation v. O'Connell* (2) applies in the present case. That is a clear decision on residence by persons not objects of the charity.

The substantial user of the premises in the present case is as a residence for nurses, and it is not permissible to look beyond that to another hereditament. Once it is found that nurses are occupying the premises, these nurses not being the objects of the charity, then the premises are not exclusively used for charitable purposes.

The decision in *Armagh County Infirmary Committee v. Commissioner of Valuation for Northern Ireland* (3)

(1) [1931] A.C. 151.
(2) [1906] 2 I.R. 479, 485.
(3) [1940] N.I. 1.

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is based on the fact that the premises in that case were situated within the curtilage of the Hospital. It was the actual user of the hereditament that was regarded in *University College, Cork v. Commissioner of Valuation* (1). The use that has to be looked at is primarily the use within the four walls, and there is not authority for the proposition that it is permissible to look beyond the four walls.

[They also referred to *McKenna v. Commissioner of Valuation* (2); *Dore v. Commissioner of Valuation* (3); *Mulholland v. Commissioner of Valuation* (4); *Heron v. Monaghen* (5); *Tyrone County Council v. Commissioner of Valuation for Northern Ireland* (6); *Gambier v. Overseers of Lydford* (7); *Martin v. Assessment Committee of West Derby* (8); *Showers v. Assessment Committee of Chelmsford Union* (9); *Good Shepherd Nuns v. Commissioner of Valuation* (10).]

Sheil K.C., Nicholson K.C. and *Agnew* for the respondent, the Management Committee of the Fermanagh County Hospital.

Moon v. London County Council (11) has no application to the present case.

The occupiers of Fort Lodge are the Management Committee. Though not in personal occupation they are occupiers. The case is one of occupation through servants. In *Commissioner of Valuation v. O'Connell* (12) Palles C.B. said : " I desire to be distinctly understood " as not deciding that if the main purpose for which a " building is used is a charitable one, as is that of an " hospital for the gratuitous healing of the poor, the " residence therein, as part of their duty, of nurses or a " resident physician would necessarily render the use " not ' exclusively for charitable purposes.' I should " be prepared to hold quite the contrary."

In the present case it has been found as a fact that (1) the nurses are the servants of the Committee ; and

(1) [1911] 2 I.R. 593.
(2) (1915) 49 I.L.T.R. 103.
(3) (1913) 50 I.L.T.R. 105.
(4) (1936) 70 I.L.T.R. 253.
(5) (1888) 22 L.R. Ir. 532.
(6) [1937] N.I. 184.
(7) (1854) 3 E. & B. 346.
(8) (1883) 11 Q.B.D. 145.
(9) [1891] 1 Q.B. 339.
(10) [1930] I.R. 646.
(11) [1931] A.C. 151.
(12) [1906] 2 I.R. 479, 485.

(2) that they must sleep at Fort Lodge when required and that while in Fort Lodge the nurses are as much under the discipline of the Committee as if they were in the Hospital.

In *McKenna v. Commissioner of Valuation* (1) and *Dore v. Commissioner of Valuation* (2), there was a personal interest. In this present case the Committee can only use this building for the purpose for which they occupy it.

Good Shepherd Nuns v. Commissioner of Valuation (3) is really an authority in the respondents' favour. In *Tyrone County Council v. Commissioner of Valuation for Northern Ireland* (4) the existence of the road did not depend on the quarry. The quarry itself was not part of the road, whereas in the present case the nurses' home is part of the charitable purpose. The nurses' home is really part of the Hospital.

[They also referred to *Greig v. University of Edinburgh* (5); *Case of the Oxford Poor Rate* (6).]

Curran K.C. (in reply) :—

The Commissioner of Valuation is on firm ground in relying on the strict wording of the Statute. The respondents have not been able to produce any authority going further than the dictum of Palles C.B. in *Commissioner of Valuation v. O'Connell* (7). The performance of charitable work within the hereditament would give the true meaning to the word "user." and the purpose of the user in this case is accommodation for nurses. In order to succeed the respondents must find some activity in the actual premises which is distinctly charitable. [He referred to the observations of Moore L.C.J. in *McLaughlin & Cosgrove v. Commissioner of Valuation for Northern Ireland* (8).]

Cur. adv. vult.

BABINGTON L.J. : The appellants in this case are the Committee of Management of the Fermanagh County

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(1) (1915) 49 I.L.T.R. 103.
(2) (1913) 50 I.L.T.R. 105.
(3) [1930) I.R. 646.
(4) [1937] N.I. 184.
(5) (1868) L.R. 1 Sc. & Div. 348.
(6) (1857) 8 E. & B. 184.
(7) [1906] 2 I.R. 479.
(8) [1937] N.I. 174, 183.

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Hospital, which is vested in them together with other premises known as Fort Lodge, both being situated in the town of Enniskillen. Fort Lodge is used in conjunction with the Hospital and the appellants claim that it is exempt from rates under the Valuation Acts as being exclusively used for charitable purposes and that it should have been so distinguished by the respondent, the Commissioner of Valuation, when making out the valuation lists.

There is no dispute as to the facts and the issue turns on the construction of sections 12 and 16 of the Valuation (Ireland) Act, 1852, and section 2 of the amending Act of 1854.

It is unnecessary to restate the facts which have been found by the county court judge. They show that Fort Lodge is a detached dwelling house owned, maintained and managed by the Committee of the County Hospital and used solely for sleeping and living accommodation for a part of the nursing staff of the Hospital. The Hospital itself is exempt from rates as being exclusively used for charitable purposes, and if Fort Lodge is also exclusively used for charitable purposes as the county court judge has found, it should also be distinguished in the valuation lists as "*exempt.*"

The relevant sections of the Valuation Acts have been judicially considered from time to time, but before proceeding to deal with the authorities it is necessary to look at the wording of the statutes themselves.

Section 12 of the Valuation (Ireland) Act, 1852, provided that all lands, buildings, etc., shall be deemed to be rateable hereditaments "and in the case of land "or buildings used exclusively for public, scientific or "charitable purposes" half the annual rent derived by the owner was made rateable.

By section 16 of the Act of 1852, "No hereditaments "or tenements or portions of the same shall be deemed "to be of a public nature, or used for such charitable, "scientific or other purposes . . . unless such heredita- "ments or tenements or portions of the same respect- "ively shall be altogether of a public nature or used "exclusively for such charitable, scientific or other "purposes aforesaid."

Section 2 of the Valuation (Ireland) Act, 1854, provided that : " In making out the lists or tables of " valuation mentioned in the said firstly hereinbefore " mentioned Act the Commissioner of Valuation shall " distinguish all hereditaments and tenements or " portions of the same of a public nature or used for " charitable purposes," etc., and exempted them entirely from all rates and assessments.

The case turns on the finding of the county court judge that the user of Fort Lodge was exclusively charitable. The Divisional Court affirmed this decision, and we are now asked to hold that it cannot be supported on the facts and is wrong in law.

In approaching this question it is important to bear in mind what the Act of 1852 says and what it does not say. Section 16 enacts that no hereditaments or tenements or portions of the same shall be deemed to be used for charitable purposes unless they are used *exclusively* for such charitable purposes. The section deals with units of valuation to which the enquiry of the Commissioner of Valuation must be directed, and the user of each unit must be ascertained by an inspection of the hereditament itself and an enquiry as to the persons in actual occupation. The section does not say that hereditaments, the user of which is not exclusively for charitable purposes can be associated with other premises, the user of which is exclusively charitable, so as to claim an exemption from rates for such first mentioned hereditaments to which they would not be entitled by reason of their own user. Nor does it say that the Commissioner can look outside the hereditament for the purpose of determining whether its user is charitable or not, when that user is not of itself exclusively charitable, or that user which is essential for the administration of an acknowledged charity carried on in other premises or which promotes the interests thereof must itself be user for charitable purposes.

The Lord Chief Justice and MacDermott J., sitting as a Divisional Court, appear, however, to have adopted these wider constructions of the statutes. They decided that Fort Lodge was used exclusively for charitable

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purposes, its purpose being, as MacDermott J. says, "subsidiary to the paramount charitable purpose which "it is the duty of the Committee to promote, namely, "the care and management of the County Hospital."

The Committee of Management of the County Hospital are entered as occupiers in the valuation lists, and MacDermott J. infers that they "as the responsible "public authority occupy Fort Lodge and use it in the "manner described in the Case because such user is "reasonably necessary for the proper and effectual "functioning of the County Hospital which they "manage and control." There is no such finding in the Case Stated, and the fact that the Committee is entered in the valuation lists is neutral. The Committee can only be said to occupy Fort Lodge through their nurses and such other disciplinary and domestic staff as are required to manage the residence, and it is the actual and not the notional occupation and user which must determine the character of the hereditament for rating purposes. The premises are found to be occupied as a residence for the nursing staff and are either occupied by the nurses or by the Committee through the nurses, in either case as a residence, and the question to be decided is whether this is or is not a charitable purpose.

We were pressed very strongly by counsel for the Commissioner of Valuation that the provision of a residence for nurses can in no sense be charitable since neither they nor those who manage the residence are objects of charity, and that their ministrations to the sick poor in the County Hospital do not make the Hospital and the residence one charitable institution.

MacDermott J., referring to the Committee, says: "Their actual user of Fort Lodge is dictated by the "requirements of the County Hospital and the im-"mediate purpose of that user is to fulfil and accomplish "the charitable objects for which the Hospital was "established." With due respect for the learned judge's opinion, I am unable to follow this line of reasoning. The immediate purpose of the user of Fort Lodge was to provide a residence for the nursing staff and, as neither of the learned judges in the

Divisional Court nor any of the counsel in this Court have suggested that the provision of a residence for nurses is an exclusively charitable purpose, this disposes of the case unless it is legitimate to enquire further to ascertain the purpose for which the nurses were employed and, having found this to be exclusively charitable, to treat it as paramount to the immediate purpose of providing them with a residence.

Dealing with the statutes without reference to authority, I am of the opinion that we cannot look beyond the actual user of the hereditament, and that Fort Lodge must therefore be treated as a nurses' residence and is consequently liable to be rated.

If the paramount user of all hereditaments must be investigated to see if such user is for exclusively charitable purposes, the Commissioner of Valuation would have to prosecute endless enquiries which would be foreign to the intention and scope of the Valuation Acts. These Acts have now been in force for a very long time during which the Commissioner of Valuation must have been guided by the Statutes themselves and by the decisions thereon, and I should be surprised to learn that the principle sought to be applied in this case has ever been admitted or acted on though a great number of cases must have arisen on each successive valuation involving the same or very similar considerations.

If it were not for the judgments delivered in the Divisional Court I would have said that the authorities establish beyond doubt that in deciding whether premises are to be exempt from rates under the Valuation Acts the Commissioner of Valuation must "examine what takes place within the boundaries in "which that hereditament is confined" per Lord Buckmaster in *Moon v. London County Council* (1). No overriding or paramount purpose has at any time been admitted to colour or contradict the actual user of the hereditament under consideration, and the liability to rates has, in my opinion, always depended on its actual and immediate user.

It is unnecessary to go back beyond the case of *Heron v. Monaghen* (2), decided in 1888. There a

(1) [1931] A.C. 151, 159. (2) [1888) 22 L.R.Ir. 532.

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claim for exemption in respect of a National School teacher's residence which was separate from his school as being a building used for public purposes was rejected, and Sir M. Morris C.J., in delivering the judgment of the Court, said: "A schoolmaster is "occupied on business of a public nature when he is "actually teaching, but he is so occupied only during "part of the day; but when that duty is over, and he "returns to his house, how can his occupation of his "private house be said to be an occupation for a public "purpose?" In the present case the charitable duties of the nurses were over, in my opinion, when they returned to Fort Lodge, and the fact that they were under a certain degree of discipline while in residence and could be ordered back to the Hospital when necessary does not alter the nature of their user or occupation so as to make it other than residential.

In the *Commissioner of Valuation v. O'Connell* (1), the claim to be exempted arose in connection with a house built by parishioners for a parish priest as a residence and for parochial purposes. It was held not to be used exclusively for charitable purposes, and Palles C.B. points out (2) that the priest was not an object of the charity in his character as parish priest. The overriding or paramount purpose of the advancement of religion was unsuccessfully argued in this case, which was decided on the same principles as were applied in *Heron v. Monaghen* (3). The Chief Baron no doubt reserves the case of doctors or nurses residing in a hospital building, the main purpose of which is charitable, but in my opinion such cases are exceptions to the general rule which can only be justified on their special facts and they accordingly have no application here.

O'Connell's Case (1) was followed in *Dore v. The Commissioner of Valuation* (4), heard in June, 1913, where the premises were occupied by a community of Franciscan Friars as a residence. The Friars were bound by vows of poverty and were occupied solely in charitable work among the sick poor. It was argued

(1) [1906] 2 I.R. 479.
(2) Ibid. 485.
(3) (1888) 22 L.R.Ir. 532.
(4) (1913) 50 I.L.T.R. 105.

that the case was distinguishable from *O'Connell's Case* (1), because the user proved was wholly ancillary and necessary to the charitable purposes of the appellant, but this paramount purpose was rejected and the premises were held to be liable to be rated. *McLaughlin & Cosgrove v. The Commissioner of Valuation* (2), is a decision to the same effect on very similar facts.

In *McKenna v. The Commissioner of Valuation* (3), exemption was claimed for premises occupied by teaching members of the Christian Brothers Community, who taught in a school in Carlow and resided in these premises situated outside the town. Once again the claim was rejected and *O'Connell's Case* (1) and *Dore's Case* (4) expressly followed. Though the arguments are not given in this report, I think the purpose of the residence of the Christian Brothers, namely, for educational purposes, must have been advanced as an overriding or paramount purpose to justify the claim for exemption which was clearly negatived by the decision.

As I have already said, these authorities must have been acted on by the Commissioner of Valuation in very many cases and are too well established to be challenged now. It is of the greatest importance that the liability under these Acts should be certain and if we were to admit the proposition contended for, many assessments now in existence would have to be revised and the future administration of the Valuation Acts would be thrown into confusion. The authorities establish what Lord Coleridge C.J., in *Martin v. Assessment Committee of West Derby* (5), described as "a plain and intelligible rule in a matter in which "plainness and intelligibility are of the greatest "possible value" and no valid reason has been shown for departing from them.

I refer to two further cases in which the principle has been affirmed that in determining the user of premises for rating under the Valuation Acts the

(1) [1906] 2 I.R. 479.
(2) [1937] N.I. 174.
(3) (1915) 49 I.L.T.R. 103.
(4) (1913) 50 I.L.T.R. 105.
(5) (1883) 11 Q.B.D. 145, 151.

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actual and immediate user must be looked to and not the more remote purposes.

In *Moon v. London County Council* (1), the County Council claimed that under the Rating and Valuation (Apportionment) Act, 1928, certain premises should be entered on the valuation lists as industrial hereditaments preliminary to their being derated. They consisted of certain offices and printing works and constituted an industrial hereditament within section 3 (1) of the Act unless excluded by the later part of the section, which provided that the expression is not to include *inter alia* a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for certain purposes, one of which was "other purposes which are not those of a factory or workshop." It was argued that as the factory was only used to print tramway tickets for the County Council's tramway undertaking it was primarily occupied and used for purposes which were not those of a factory or workshop. This argument failed and the hereditament was held to be an industrial hereditament. The argument turned on whether the printing works were merely ancillary to and part of the tramway undertaking and therefore not a factory or workshop. Lord Buckmaster says (2): "This argument depends . . . upon the assumption "that in order to ascertain what are the purposes "referred to in the Act 'which are not those of a "'factory or workshop,' it is permissible to inquire "not as to the purposes for which the premises are "used but the purpose to which the goods that they "produce are to be applied. I cannot accept this "contention. It appears to me that running through "the statute is the idea of exempting particular "premises described throughout as hereditaments, "and that it is the use to which those premises are "put that must be considered and not what may be "ultimately done with whatever commodity they "create . . . If you want to see whether the here-"ditament is used for the purposes of a dwelling house, "you examine what takes place within the boundaries "in which that hereditament is confined."

(1) [1931] A.C. 151. (2) Ibid. 158.

The other case is the *Tyrone County Council v. The Commissioner of Valuation for Northern Ireland* (1), in which the County Council claimed examption from rating in respect of certain quarries and other property used solely in connection with the upkeep of public roads on the ground that these quarries and property were an essential part of the highway maintenance and therefore used for public purposes. The claim was disallowed and Best L.J., referring to the judgment of the Lord Chief Justice, then Andrews L.J., in the Divisional Court, says (2): "We, too are unable to "accept this argument, and we think it is unsound "because it fails to distinguish between what is a "public purpose and what are the means required to "carry out such purpose." The test applied related therefore to the nature of the actual user and not to the ultimate purpose of such user, which was undoubtedly of a public nature.

Both the last-mentioned cases are "*in pari materia*" with this case, and I am of opinion that, upon authority and principle alike, the exemption claimed for Fort Lodge cannot be sustained.

The Armagh County Infirmary Committee v. The Commissioner of Valuation for Northern Ireland (3), was relied on as an authority for the appellants, it being urged that there is no difference in principle between the surgeon's residence in that case, which was within the curtilage of the Infirmary though separated from the Infirmary itself except for a connecting passage, and the nurses' residence in this case, which is not within the curtilage of the Fermanagh Hospital but adjacent. Andrews L.C.J. delivered the judgment of the Court in the Armagh Case and, as I read his judgment in the present case, he reaffirms the decision as applying to the premises here, which are not within the curtilage but some 500 yards distant, and extends it to all buildings which are occupied and used in connection with a charitable undertaking irrespective of their location—provided, of course, that on investigation it is found that the premises are

(1) [1937] N.I. 184.
(2) Ibid. 194.
(3) [1940] N.I. 1.

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so occupied. As to the investigation to be made he says : " I further agree with him (MacDermott J.) that, " whilst we are confined to the hereditament itself for " the purpose of ascertaining the nature of its user and " the person or persons who are in occupation, we are " fully entitled to look outside the hereditament, as, " for example, in the present case to the County " Hospital, for the purpose of determining the purposes " of such user."

I cannot agree with either of these propositions. In the Armagh Case the doctor's residence was held to be exempt because it was part of the Infirmary and, while the decision may be supported on this ground, I am not satisfied that it was rightly decided. But if the residence had been outside the curtilage of the Infirmary it would, in my opinion, have been impossible to hold that it was entitled to exemption unless the paramount object of providing the doctor with a residence in order to further the objects of the charitable institution in which he was employed could be taken into account.

The decision of the Divisional Court must be reversed and the question submitted by the county court judge answered in the negative.

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PORTER L.J. : This is an appeal by the Commissioner of Valuation from an order of the Divisional Court declaring that the County Court Judge of Fermanagh was right in holding that the hereditament known as Fort Lodge in the town of Enniskillen occupied by the Committee of Management of the Fermanagh County Hospital as a residence for a portion of the nursing staff of the hospital was used exclusively for charitable purposes and should therefore be distinguished as exempt in the Valuation List under section 2 of the Valuation (Ireland) Act, 1854.

The facts, which are set out in the Case Stated by the county court judge, may be summarized as follows :—

Fort Lodge consists of a detached house, offices and grounds in Enniskillen held by the Management Committee under a lease for five years from the 1st

day of May, 1945, at a rent of £130 per annum. It is situate about 500 yards from the Hospital which is held under a different title. It affords sleeping and living accommodation for portion of the Hospital Nursing Staff who perform full nursing duty in the Hospital, and do not carry on private practice in or from Fort Lodge. The nurses must sleep as directed either in the Hospital or in Fort Lodge, and they are liable to be interchanged as the occasion of nursing duty requires. They get the principal meal of the day in the Hospital, and it is stated that " the salary of a " nurse is not affected by the hereditament " which I take to mean that whether a nurse is transferred from the Hospital to the Lodge or from the Lodge to the Hospital her salary remains unaltered. When residing in the Lodge the nurses are subject to discipline and to the hours and regulations prescribed by the Committee.

The judgments of the Divisional Court appear to be based upon two separate and distinct grounds as follows :—

1. Since the nurses' quarters inside the Hospital buildings are exempt because their residence therein is reasonably necessary for the proper maintenance of the Hospital services, Fort Lodge for the same reason is entitled to exemption. The Committee ought not to be penalized if they are obliged through lack of space within the Hospital buildings, or inability to procure building materials, or want of funds, to provide necessary accommodation for a portion of the nursing staff outside the precincts of the Hospital but at a convenient distance from it, and it is not suggested that the accommodation in Fort Lodge is more than is reasonably necessary for the nurses who are directed to reside there from time to time.

2. In deciding whether Fort Lodge is or is not used exclusively for charitable purposes, the Commissioner may and indeed must look outside and beyond the hereditament in question, and when he finds that that hereditament has been taken by the Committee as a residence for part of the nursing staff of the Hospital, which is unquestionably used exclusively for charitable

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purposes, he should disregard the user of Fort Lodge as a residence and have regard only to the main or paramount purpose for which it was acquired by the Committee, namely, for the proper maintenance of the Hospital services.

In stressing the necessity for the Commissioner to look outside and beyond the hereditament in question when he is considering whether it is used for charitable purposes, the Divisional Court appears to have overlooked the provisions of section 12 of the Valuation Acts Amendment Act (Northern Ireland), 1932, which enables the Commissioner to serve a notice upon the occupier or owner requiring him to make a return containing all the particulars reasonably necessary for carrying out the valuation. So far from being in blinkers, the Commissioner has ample statutory power to obtain all necessary information without having to look outside and beyond the hereditament.

It appears to have been the settled practice of the Commissioner to treat a hospital building as a single unit of valuation, thus making no separate assessment of that part of the building allotted to the medical and nursing staff. No doubt during the eighteenth and nineteenth centuries, and even later in some cases, the accommodation provided for the doctors and the nurses was both miserable and inadequate, and the Commissioner on inspecting the rooms which they occupied may have considered that he was justified in acting upon the "*de minimis*" principle, or he may have thought that no private profit or use was derived by the doctors or nurses from their residence within the Hospital. However that may be, I do not think that there is any authority for the proposition that a separate building used exclusively as a residence should be deemed to be used exclusively for charitable purposes on the ground that those who reside therein are employed to perform charitable work which is carried on elsewhere in another hereditament.

The true view as explained by Palles C.B., who delivered the judgment of the Court in *Commissioner of Valuation v. O'Connell* (1), is that a public hospital

(1) [1906] 2 I.R. 479.

used for charitable purposes is not to be deprived of the statutory exemption by reason of the residence of the medical and nursing staff *within the hospital* as part of their duties. Madden J. expresses the same opinion in *McKenna v. Commissioner of Valuation* (1). "We "all know," he said, "that in a hospital there is a "resident surgeon, a resident physician, that nurses "and other employees have their residence *in the* "*hospital*, but it does not on that account cease to be "a hospital dedicated to a charitable purpose."

The plain meaning of these authorities is that the entire hereditament is entitled to exemption *notwithstanding* that an integral part of it is used as a residence for the medical and nursing staff of the hospital. Fort Lodge is not an integral part of the Hospital building, but a separate building, a distinct hereditament held under a separate title and situate some 500 yards from the Hospital. It is actually used by the nursing staff, who are not objects of the charity, for residential purposes, just as the Hospital is actually used for charitable purposes, that is to say, for the treatment of those patients who are objects of the charity.

There is a series of Irish cases in which exemption was claimed for reasons somewhat similar to those advanced by the Management Committee.

Heron v. Monaghen (2) was the case of a school-master's residence which was separate and distinct from the school building. Morris L.C.J. said that the residence was neither occupied nor used for public purposes though it might be ancillary to the performance of the school-master's public duties, and that it was no more occupied for public purposes than was the residence of any other person who held a public position.

In *O'Connell's Case* (3), to which I have already referred, the parish priest occupied a residence at some distance from the church solely for the purpose of carrying out his religious duties in the parish. Palles C.B. held that the residence was provided for the benefit and convenience of the priest, who therefore derived "a private profit or use" from it, and that such a

(1) (1915) 49 I.L.T.R. 103.
(2) (1888) 22 L.R.Ir. 532.
(3) [1906] 2 I.R. 479.

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private profit or use prevented the premises from being used exclusively for charitable purposes. According to the test applied by the Chief Baron the question was : " Is the occupation by the very Reverend respondent, " because he is a parish priest, a private profit or use, or " in other words, is he in his character of a parish priest " an object of the charity ? " " I desire," he said, " to be distinctly understood as not deciding that " if the main purpose for which a building is used " is a charitable one, as is that of an hospital for the " gratuitous healing of the poor, the residence therein " as part of their duty, of nurses or a resident physician " would necessarily render the use not 'exclusively " ' for charitable purposes.' I should be prepared to " hold quite the contrary. But in the present case, " in my opinion, this house was provided for the " benefit and convenience of the parish priest and " not as imposing upon him the personal *obligation* of " residence there which medical gentlemen and nurses " may be subjected to." The valid charitable trust, which was created by the lease under which the residence was held, had for its objects the Roman Catholic parishioners of the parish, but incidentally it provided a private residence for the priest whose duty it was to minister to the spiritual needs of those parishioners, and inasmuch as he was not an object of the trust, he derived a " profit or use " directly from the residence. Would the decision have been different if the charitable trust had imposed upon the priest the obligation of residing upon the premises ? I think the decision would have been the same, because the use and benefit which he enjoyed and derived from the residence would not have been altered or diminished in any way by the imposition of such an obligation, and so long as he, not being an object of the trust, derived a " private profit or use " from the premises they could not be considered to be used exclusively for charitable purposes, notwithstanding the fact that they were held by trustees expressly for charitable purposes.

There was a similar decision in *McKenna's Case* (1) which was heard by Madden, Kenny, and Dodd JJ.

(1) (1915) 49 I.L.T.R. 103.

McKenna and five other Christian Brothers resided in a dwelling house which had been erected out of the proceeds of a legacy bequeathed to the Brothers. The accommodation consisted of five bedrooms, one common room— a kitchen and a class room which was occasionally used for day and evening classes. The residence was some distance from the town of Carlow where the Brothers had a free school which was attended by 700 boys. The dwelling house was situate in a plot of land which also belonged to the Brothers and contained 2 acres 1 rood and 39 perches. Some of the more advanced pupils received instruction in the class room in the dwelling house. Madden J., delivering the judgment of the Court, said that the dwelling house did not cease to be their residence because the Brothers from time to time gave special instruction there to boys brought up from the school in Carlow. "I quite "agree," he said, "that where a building is dedicated "exclusively to a charitable purpose, such as a school "or an hospital, the circumstance that necessarily or "fairly some teachers required for the school have their "residence in the premises, does not change the char- "acter of the institution and convert a building "dedicated exclusively to a charitable purpose into a "mere residence." He then referred to *O'Connell's Case* (1) and said: "That case was decided upon the "general principle that if premises are used sub- "stantially as a residence they are liable to assessment, "although the persons residing in the building use it "for the discharge of charitable duties."

In *Dore's Case* (2) premises in Ennis consisting of a dwelling house, out-offices and a plot of land were occupied by mendicant friars of the Franciscan Order who officiated in the adjacent chapel and whose services were entirely devoted to religious and charitable duties. No fees were collected nor was any sum paid for seats in the chapel, nor according to the rules of the community could any member have or retain any money for his personal use, and all offerings of money after supplying the necessary wants of the friars, and the upkeep of the chapel, house, offices and lands were

(1) [1906] 2 I.R. 479. (2) (1913) 50 I.L.T.R. 105.

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devoted to the relief of the poor, or charitable purposes. Counsel for the Community contended that the user of the residence was merely ancillary to and necessary for the accomplishment of the charitable purposes of the friars, who derived no private profit or use whatever from the hereditament, whereas in *O'Connell's Case* (1) the use of the residence was part of the remuneration of the parish priest and was in the nature of a private profit. The Court, consisting of Palles C.B., Madden and Wright JJ., held that the decision in *O'Connell's Case* (1) applied and that the premises were not exclusively used for charitable purposes.

In my opinion these two last mentioned decisions carry the principle of *O'Connell's Case* (1) a step further, and remove any doubt which might have been raised by the reference of the Chief Baron to the fact that Father O'Connell was not *bound* by a personal obligation to reside in the dwelling house provided for him, because the Christian Brothers and the Franciscan Friars, as we all know, are subject to rigid discipline and are unquestionably bound by the most solemn personal obligation to reside and work wherever they are directed by their respective superiors.

The same principle was applied in *McLaughlin & Cosgrove v. Commissioner of Valuation* (2) to a convent in Cookstown occupied by the Sisters of Mercy, the majority of whom were engaged in teaching in the adjoining school or instructing girls over school age or working among the poor. Inasmuch as the greater portion of their charitable work was performed outside the convent, a Divisional Court (Moore L.C.J. and Brown J.) held that the convent was mainly used as a residence and that the principle established in the cases of *O'Connell* (1), *McKenna* (3) and *Dore* (4) applied. In this case also the Sisters of Mercy, although by their vows bound to live in the convent and subject themselves to conventual discipline, were nevertheless held to enjoy a private profit or use derived from residence therein. Moore L.C.J. said there was no evidence that all the charitable work or even the major

(1) [1906] 2 I.R. 479.
(2) [1937] N.I. 174.
(3) (1915) 49 I.L.T.R. 103.
(4) (1913) 50 I.L.T.R. 105.

portion of it was done inside the convent. I cannot see any difference in principle between the case of the convent and that of Fort Lodge. In fact the claim for the exemption of the convent is somewhat stronger than the present claim because some part of the charitable work was carried on in the convent, whereas in Fort Lodge no charitable work whatever is performed.

As regards the distinction drawn by the Divisional Court between the ancillary or subsidiary purpose for which a hereditament is used and the main or paramount purpose, the opinion expressed by the Divisional Court that the Commissioner in making his valuation is bound to discard the former and to pay regard only to the latter purpose is not only devoid of authority but seems to me to be in direct conflict with those sections of the Rating and Valuation Code under which exemption is granted to premises used for charitable purposes unless the occupier derives therefrom a private profit or use. Residence in Fort Lodge, which the Divisional Court describes as merely ancillary to the main purpose, is unquestionably a private profit or use which must be regarded by the Commissioner in deciding whether the premises are altogether and exclusively used for charitable purposes.

The same contention based on the distinction between the ancillary and the main purpose for which the premises were occupied and used was advanced and rejected in *Tyrone County Council v. Commissioner of Valuation for Northern Ireland* (1). Exemption was claimed for five quarries which the County Council had taken on lease to obtain the stone and other material required for the repair and maintenance of the public roads in the County.

It was contended for the County Council that the quarries were dedicated to or used for public purposes because they were occupied and used for the purpose of obtaining stone and material which was merely ancillary to the main purpose which was the repair and maintenance of the public roads. The claim for exemption was rejected by Andrews L.J. (as he then was), who held that the quarries were not occupied or used for public

(1) [1937] N.I. 184.

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purposes and also that the County Council directly derived a private profit or use by working the quarries. The decision was affirmed by this Court, Best L.J. saying that there was a vital distinction between a public purpose and the means necessary to effect that purpose.

It is impossible to distinguish that case from the present one. The quarries were occupied by the County Council and their workmen just as Fort Lodge was occupied by the Management Committee and their nurses ; and the purpose of the County Council was to provide the stone and material for the public roads just as the purpose of the Management Committee was to provide the accommodation required for the Hospital nurses, and in each case the occupiers derived a private profit or use from the occupation of the hereditament.

That decision, with which I entirely agree, is directly opposed to the view that the Commissioner ought to disregard the actual user of Fort Lodge as a residence and to have regard only to the alleged paramount purpose for which it was acquired, that is to say, for the charitable work of the County Hospital.

In *Armagh County Infirmary Committee v. Commissioner of Valuation for Northern Ireland* (1) a dwelling-house and out-offices within the curtilage of the Infirmary and connected with it by an enclosed communicating passage was occupied by Dr. Deane, the part-time surgeon of the Infirmary, who was required to reside therein by the terms of his employment.

For the Commissioner it was argued that the dwelling house was physically separate and distinct from the main Infirmary building and that Dr. Deane was only a part-time and not a whole-time medical officer. The Divisional Court rejected both contentions and held that the residence was exempt. I think this is a decision of doubtful validity, not because the dwelling house was physically a separate building (on which I offer no opinion) but because the evidence shewed that Dr. Deane derived a substantial " profit

(1) [1940] N.I. 1.

"or use" from his residence in the premises. He had a private practice which he carried on from the house, and made arrangements with his patients over the telephone therein. He was medical officer for the Gaol in Armagh, for the Asylum for the Blind, for the Royal School, and for the Armagh Military Depot, and he also held other minor medical posts in County Armagh. The residence was doubtless occupied and used by him as part-time surgeon of the Infirmary, but it also served him as a base from which to carry on his practice in the various institutions mentioned, which I cannot but think was a very substantial private profit or use derived from the residence.

It has been suggested that this case is analogous to that of a kitchen which provides meals for the hungry poor and that it makes no difference whether the meals are distributed to the poor at their homes or in the kitchen.

So far as the charitable intentions of the benefactors are concerned it certainly makes no difference, but whether the premises are exempt if no meals are served or distributed therein is very doubtful. There is, however, a wide difference between such premises which confer no benefit or advantage upon any one except the hungry poor, and Fort Lodge which affords board and lodging to the hospital nurses who are not the objects of charity.

Under the English Poor Law Act (43 Eliz. c. 2) all occupiers are made liable to the poor rate, and the Statute contains no exceptions, differing in this respect from the Irish Rating and Valuation Code, which exempts three classes of premises, viz., hereditaments of a public nature used altogether for public purposes, hereditaments used exclusively for charitable purposes, and hereditaments used exclusively for the purposes of science, literature or the fine arts. In England, after many conflicting decisions on what were public purposes, the House of Lords finally decided that under the English Act all property capable of beneficial occupation was liable to be rated, and that only property in the occupation of the Crown or in that of persons using it exclusively in and for the service of

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the Crown was exempt, on the ground that the Crown not being named in the Statute was not bound thereby. (*Mersey Docks v. Cameron* (1).) By a long series of cases still regarded as good law it was established that the exemption applied to property occupied for the purposes of the Government such as Government Departments, police stations, prisons, County buildings occupied for Assizes and County Courts, etc., etc., and although care should be exercised in citing English cases as authorities on the law of rating in Ireland, where the exemptions are statutory, such of those decisions as rest upon the user necessary to secure exemption are distinctly valuable. (*Clancy v. Commissioner of Valuation* (2).) I wish, therefore, to refer to a number of English cases relating to premises used for public purposes which are entitled to exemption both in England and Ireland, namely, prisons and police stations.

In *Gambier v. Lydford Overseers* (3) exemption was claimed for certain prison officers who were obliged to reside in some houses and cottages without the walls and at some distance from the prison. The argument of the Attorney-General, Sir Alexander Cockburn, is interesting. "The occupation," he said, "of the "buildings by the officers without the prison, inas- "much as it is confined to such occupation as is "essential to the proper performance of their duties, "cannot in principle be distinguished from the "occupation within the prison. The establishment "requires the officers; and they are placed without "any intention on their own part, on premises be- "longing to the establishment. What difference can "it make whether such premises are within or without "the walls of the building principally appropriated to "the purpose of confinement . . . ? All buildings "required as accessory to the prison seem to come "within the same principle." This was the very argument which was presented to us in the present case.

The Court held that the houses and cottages were liable to be rated. Lord Campbell referring to the

(1) (1865) 11 H.L.C. 443.
(2) [1911] 2 I.R. 173.
(3) (1854) 3 E. & B. 346.

officers who resided in them said: "It cannot be "disputed, I think, that they would be rateable if they "paid rent for these houses, and received an allowance "for the purpose of doing so. But I cannot see that "it makes any difference whether they have a "pecuniary allowance or a residence allotted to them: "there is a benefit in each case; only the salary will "be less in one case than in the other, because the "benefit is in a different form. It does, I allow, appear "to be a subtle distinction, when we discriminate "between the residences within the walls of the prison "and those without, but, whenever we find ourselves "on the confines of conflicting principles, the dis-"tinctions must inevitably be subtle. The officers "are in the prison merely for the purposes of the "prison, but if we allowed the exemption without the "prison, we should have to allow it in cases where "the resident was in a different parish."

Wightman J. agreed. Coleridge J. dissented, expressing the same opinion as that of the Divisional Court in the present case. "Why is it," he asks, "that officers are not rateable for what they occupy "within the walls? The directors occupy all within "the walls by the prisoners and the officers, and this, "not being a beneficial occupation, has in many cases "been held not to be rateable. Then the fact here is "that residences beyond the walls are allotted to "officers which are absolutely necessary for the per-"formance of their duties. They have no choice as to "where they reside, they pay no rent. On the last "circumstance, however, I do not rely much, for that "would merely affect the amount of the salary. The "residences need not be within the walls; but they "must be near. On what principle can we distinguish "them from residences actually within the walls?"

This decision was followed by the Court of Appeal in *Martin v. West Derby Assessment Committee* (1). A police superintendent was obliged as a term of his employment to reside in a house about a quarter of a mile from the police station. The rent of the house was paid by the County Council out of the police rate

(1) (1883) 11 Q.B.D. 145.

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and the amount deducted from his salary. The house was liable to be used for police purposes as the Chief Constable might direct, but the superintendent was compelled to reside in it so long as it was rented for him. Coleridge L.C.J. said: "It is most important "that in rating cases where a line has been drawn by "competent authority which is plain and intelligible "to the persons who have to exercise the duty of "rating, and which has been assented to in a variety "of cases, we should adhere to such a line unless we "see some very good reason for differing from it. "Now it appears to me that such a line has been drawn "plainly and so that the overseers can clearly act "upon it in the case of *Gambier v. Lydford Overseers* (1). "I am of opinion that that case was rightly decided "and ought to be upheld by this Court." Brett and Bowen L.JJ. agreed, the latter saying that "the rule "laid down by Campbell L.C.J. in *Gambier's Case* (1) "between residence within and residence without the "walls of the prison was only a rule or guide by which "to steer one's course in dealing with rating cases, "but it is a rule of the utmost importance and should "not be lightly unsettled by the Court."

MacHarg v. Stoke upon Trent Assessment Committee (2) is a decision to the same effect. A sergeant of the County police was obliged in the discharge of his duties to occupy a cottage two miles from the police station. The rent of the cottage was paid out of the County rate, but there were no cells attached nor rooms set apart for police business. Mathew J. followed the decisions in the last two cases, and said that if the lodging of an officer of a gaol is part of the gaol then it is not rateable, but if it is not part of the gaol the officer is rateable.

The same principle was affirmed in *Showers v. Chelmsford Assessment Committee* (3) by a Divisional Court (Day and Lawrance JJ.) and the Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.). In that case the quarters of the police officers in the station were held to be rateable because they occupied by far the greater part of the station.

(1) (1854) 3 E. & B. 346.
(2) (1884) 48 J.P. 775.
(3) [1891) 1 Q.B. 339.

Cross v. West Derby Union (1); *Leicester County Council v. Leicester Assessment Committee* (2); and *Monmouth Overseers v. Monmouthshire County Council* (3), are all based upon the rule laid down in *Gambier's Case* (4).

The difference between residences within and residences without the walls or precincts of the exempted hereditament is clearly recognized in these English decisions relating to premises of a public nature or dedicated to public purposes, and although a wider interpretation has been given to "public" purposes" in Ireland (*Londonderry Guardians v. Londonderry Bridge Commissioners* (5), I think that the rule which has been recognized in England for nearly a century is applicable in Ireland not only to premises of a public nature but also to premises used for charitable purposes. That there was no difference in this respect, at all events, between the law in England and in Ireland is apparent from a decision of quarter sessions in a case in which Christian Brothers occupied a dwelling-house situate about seventy yards from the schoolhouse in which they taught and the County Court Judge held that the house was not exempt (*Keating v. Guardians of Armagh Union* (6). That case was decided 87 years ago by Sergeant O'Hagan, afterwards Lord O'Hagan, who delivered the leading judgment in the *Londonderry Bridge Case* (5), and so far as I am aware the Valuation authorities have acted on the same principle ever since.

There has been considerable discussion about *Moon's Case* (7). Counsel for the Commissioner cited this decision as showing that in ascertaining the purpose for which a hereditament is used one ought not to take into account any circumstance or activity outside the hereditament in question. In other words one must have regard only to the mode and purpose of the actual user. For the Management Committee it was argued that it was a decision on the meaning of the words in

(1) (1899) 81 L.T. 645.
(2) (1898) 48 L.T. 463.
(3) (1902) 87 L.T. 65.
(4) (1854) 3 E. & B. 346.
(5) (1868) I.R. 2 C.L. 577.
(6) (1859) 5 Ir. Jur. (N.S.) 84.
(7) [1931] A.C. 151.

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section 3 (1) of the English Rating and Valuation (Apportionment) Act, 1928, and had no application to the present case.

The London County Council claimed that a printing establishment, their property, situate in Effra Road, London, which was admittedly a factory under the Factory Acts, was an "industrial hereditament" and was therefore entitled to exemption under the Valuation and Rating (Apportionment) Act, 1928. The Assessment Committee on the other hand contended that although it was a factory, yet it was primarily occupied and used for purposes "which were not those of a "factory" to wit, for the printing of tickets and other printed material for use on the Council's tramway undertaking which was a separate hereditament. Which was to prevail? The user for factory or the user for non-factory purposes? Was the user for factory purposes merely ancillary to the user for the non-factory purposes of the tramway undertaking? Were the non-factory purposes to be regarded as the main or primary purposes for which the hereditament was occupied and used?

The House of Lords held that the purposes for which the hereditament was primarily occupied and used were to be determined by the actual use of the hereditament itself, and not by the use that was going to be made of the work done on the premises. Lord Warrington of Clyffe said that the contention of the Assessment Committee was based on a confusion between the purposes for which the hereditament itself was occupied and used and the purposes to which the products of that occupation and user were devoted. The striking resemblance of the argument in *Moon's Case* (1) to the argument which was addressed to this Court is attributable to the fact that the Assessment Committee in *Moon's Case* (1) and the Management Committee of the Hospital in the present case contended that the user of the hereditament in question was merely ancillary or subsidiary to what were alleged to be the primary or paramount purposes which in *Moon's Case* (1) were non-factory, and in the present case charitable purposes.

(1) [1931] A.C. 151.

In deciding against this contention the House of Lords was following what has been long established as a fundamental principle of the law of valuation and rating, both in England and in Ireland, namely, that in order to determine the purpose for which a hereditament is occupied and used regard must be had only to the actual physical user. Fort Lodge is used as a residence or hostel for the nurses. It forms no part of a charitable institution, nor is any charitable work performed in it, and we should be acting contrary to a long series of Irish and English decisions if we were to hold that it is used exclusively for charitable purposes on the ground that the nurses are employed in the charitable work of the County Hospital which is an entirely separate hereditament.

Whether the statutory exemption should be extended so as to include convents, monasteries, nurses' hostels, clergymen's houses and other buildings which serve as lodgings or residences for those whose charitable work is performed elsewhere is a matter of public policy to be settled by the Legislature on which it is no part of our duty to express an opinion.

For these reasons I am of opinion that the question submitted by the County Court Judge in the Case Stated should be answered in the negative.

BLACK J.: It is conceded that the treatment of patients in the Fermanagh County Hospital is a charitable activity, and during the argument we were informed that in the valuation lists the Commissioner of Valuation has—whether rightly or wrongly—distinguished the main buildings of the County Hospital as used for charitable purposes. The question at issue in the present proceedings is whether the hereditament known as Fort Lodge—used as it is by the Committee of Management of the County Hospital in the manner described in the Case Stated—ought also to be so distinguished in the valuation lists in pursuance of the provisions of section 2 of the Valuation (Ireland) Amendment Act, 1854, on the ground that it is used exclusively for charitable purposes within the meaning of that section and of section 16 of the Valuation (Ireland) Act, 1852.

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The argument put forward on behalf of the Commissioner of Valuation is twofold. In the first place it is submitted that in order to determine whether or not a hereditament is used for a charitable purpose one must look merely at the particular activities carried on in the hereditament itself and consider whether they are in themselves, and without reference to their object, of a charitable nature. According to this contention it is not permissible to look outside the hereditament or to take into consideration how the actual user of the hereditament is related to anything not manifest upon the hereditament itself. In the second place it is contended that even if one is entitled to look outside Fort Lodge and to consider how its use is related to the activities carried on in the main buildings of the County Hospital, nevertheless the use of Fort Lodge as set out in the Case Stated is not a use exclusively for a charitable purpose.

With regard to the first of these contentions, the submission is that looking at Fort Lodge itself one finds that it is being used merely for residential purposes and that the persons residing in the building are not the objects of a charity. Accordingly it is said that no charitable purpose is manifested within Fort Lodge by its user, and it is contended as a matter of law that it is not legitimate to look outside the confines of the hereditament itself in order to decide whether or not it is being used for a charitable purpose.

Leaving aside for the moment the possible effect of reported decisions, it certainly would seem rather remarkable if in considering whether a hereditament was being used for charitable purposes we were precluded from looking outside the hereditament and could only have regard to what was manifested upon the hereditament itself. Take the example suggested by MacDermott J. of a kitchen used solely for the purpose of cooking free meals for the hungry poor, the meals being distributed to the poor at their own homes and there being nothing in the physical appearance of the kitchen or in the operations carried on there to indicate whether the meals were being prepared for gratuitous distribution to the poor or for sale

as a commercial venture. Can it be said that in endeavouring to ascertain whether the kitchen is being used for a charitable purpose one is not entitled to look outside it or to have regard to what is being done with the meals which are cooked in it ? This would seem to be a strange conclusion. But of course it is conceivable that we may be driven to it by the weight of authority. One therefore turns to see what support, if any, for the contention is to be found in reported decisions. On this branch of the case the main reliance in the argument on behalf of the Commissioner was placed on the decision of the House of Lords in *Moon v. London County Council* (1). No doubt *Moon's Case* (1) at first sight bears a certain superficial resemblance to the present case. Both cases are cases concerned with valuations for rating and with clauses providing for exceptional treatment of hereditaments used for certain special " purposes." But the resemblance is, I think, only a superficial one. The way the question arose in *Moon's Case* (1) was this. Being minded to confer certain reliefs from rates in respect of (*inter alia*) industrial hereditaments, Parliament by the Rating and Valuation (Apportionment) Act, 1928, directed that in valuation lists industrial hereditaments were to be distinguished from other hereditaments. By section 3 (1) of the Act the term industrial hereditament was defined so as to include a hereditament occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts. But by a proviso to this definition it was enacted that the expression " industrial hereditament " does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say :—

(*a*) the purposes of a dwelling-house ;
(*b*) the purposes of a retail shop ;
(*c*) the purposes of distributive wholesale business ;
(*d*) purposes of storage ;
(*e*) the purposes of a public supply undertaking ;
(*f*) any other purposes, whether or not similar to

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any of the foregoing, which are not those of a factory or workshop.

The object of this Proviso was that while proposing to provide rating reliefs for hereditaments occupied and used as factories or workshops, the Legislature did not intend that those reliefs should extend to hereditaments which, although they fell within the definitions of factories or workshops contained in the Factories and Workshop Acts, were primarily occupied and used for purposes which were not factory purposes or workshop purposes. One finds the position very clearly put by Lord Dunedin (1): "It was not wished "to extend this rating benefit to a hereditament which, "although it was called a factory, yet was not primarily, "and that, I take it, is equivalent to 'mainly,' used "for factory purposes. To do so when the factory "engaged but a small portion of the hereditament "would be to give relief little in keeping with the true "industrial tenement sought to be relieved. Accordingly, you have enumeration of various things which "are not factory operations. But be it observed that "in each and all of the sentences, (*a*), (*b*), etc., the "nominative is a hereditament which is described "as being used and occupied primarily for a "specific purpose which is not a factory purpose. "Obviously part of the hereditament is a "factory, but the portion occupied for the other "purposes is in contradistinction to the portion "occupied for factory purposes, and the question is— "Which is primarily or most occupied? In other "words, the whole hereditament is being considered, "for upon that whole the relief would necessarily be "calculated, in order to see whether it is used and "occupied primarily or mainly for non-factory purposes, in which case the privilege is not accorded. "The truth is that 'for the purposes of' might perfectly "well be expressed by the one little word 'as'."

The question, then, under the proviso to section 3 (1) of the Act of 1928 as expounded by the House of Lords is simply whether the hereditament is used mainly as a factory or whether it is used mainly as a dwelling-house

(1) Ibid. 166-167.

or as a retail shop and so forth. It was accordingly held that in determining under the proviso whether a hereditament occupied and used as a factory is primarily occupied and used for any of the specified non-factory purposes it is the actual use to which the hereditament itself is put that has to be considered and not the use to be made of the products of the work carried on in the hereditament. In the phrase "occupied and used for the purposes of" the words "for the purposes of" are obviously susceptible of different shades of meaning. They may be construed narrowly or they can be construed widely. Their proper construction in an Act of Parliament can only be determined by a consideration of the scheme and object of the Act and an examination of the context in which the phrase is found. In *Moon's Case* (1) the House of Lords, on consideration of the scheme and object of the Act of 1928 and an examination of the Proviso to section 3 (1), held that the words "for the "purposes of" as used in that Proviso were to be given a narrow interpretation, that in fact they were to be read as simply meaning "as." In other words the House of Lords held that the exceptions then under consideration related to the manner of the use of the hereditament and not to the object of the use of the hereditament. When one enquires whether a hereditament is being used for the purposes of a dwelling-house or for the purposes of a retail shop or for purposes of distributive wholesale business or for purposes of storage, one is clearly enquiring as to the manner of use of the hereditament and not as to the objects of such user. In such circumstances, as Lord Dunedin says, "for the purposes of" might perfectly well be expressed by the one little word "as." But I think that the House of Lords in determining the sense in which the words "for the purposes of" were to be construed in the particular statute which they had under consideration never intended to lay down as a general principle of interpretation that those words were always to be construed in that sense in rating statutes, or even that there was any prima facie

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presumption that they were so to be construed in such statutes. I can find nothing in the case to suggest that the words in question, when found in a rating statute, are to be treated as necessarily referring merely to the manner of use of the hereditament in cases in which it cannot be pronounced that this particular meaning is indicated by the scheme and object of the Act and the context. Indeed it would appear to me that this is amply recognised in a number of the opinions delivered in *Moon's Case* (1). It will be remembered that heading (*e*) of the Proviso to section 3 (1) of the Act of 1928 reads "the purposes of a public supply "undertaking." From the very guarded references made by their Lordships to this sub-head, I think it was recognised that in considering whether a case fell under this sub-head it might not be sufficient merely to enquire what was being done on the particular hereditament itself but that one might have in this case to look outside the hereditament and enquire as to the destination of the commodity (such as gas or electricity) produced by the factory and to ascertain whether it was produced for use by a limited number of individual consumers or whether it was produced for distribution by a public supply undertaking. In other words one might have to make enquiry not only as to the manner of the user of the hereditament but also as to the object of such user; and enquiry as to the object of the user would almost inevitably lead outside the hereditament. Accordingly, I do not think that *Moon's Case* (1) can be taken as laying down a general rule as to the meaning of the words "used for the purposes of," or that it is any authority for the proposition that in construing the words "used for charitable purposes" contained in section 2 of the Valuation (Ireland) Act, 1854, one must necessarily look only to the actual activities carried on upon the hereditament and must close one's eyes to the object and purpose of those activities, or even that it is any authority for the proposition that there is any prima facie presumption that those words ought so to be construed. I regard *Moon's Case* (1) as a decision upon the construction of a particular

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phrase in a particular statute, a construction founded upon the scheme and object of that particular statute. It does not purport to lay down a sacramental interpretation which is always to be affixed to the phrase "used for the purposes of" when found in a rating statute, and I should imagine that the very learned Judges who decided *Moon's Case* (1) would be greatly surprised to learn that their decision was being invoked as authority for the proposition contended for by the Commissioner of Valuation on the present appeal.

I therefore approach the consideration of section 2 of the Valuation (Ireland) Act, 1854, unfettered by the alleged general legal principle that in considering whether a hereditament is being used for charitable purposes one must only have regard to the activities carried on upon such hereditament and must disregard the aim and object of those activities. It might indeed be that from a consideration of the scheme and object of the statute and the context in which the phrase was used one might be driven to the conclusion that the words "used for charitable purposes" ought to be construed in the narrow sense contended for by the Commissioner. For my part, however, I cannot accept the view that the words "used for charitable "purposes" as found in section 2 of the Act of 1854 are to be given this narrow construction, and that in ascertaining whether premises are used for charitable purposes one is not entitled to enquire as to the aim or object of the user. Such a construction would, as it seems to me, be totally at variance with the considerations to which the ordinary man giving the phrase "used for charitable purposes" its ordinary English meaning would address himself when enquiring whether a hereditament was used for charitable purposes. Take, for instance, MacDermott J's. example of the kitchen used solely for the purpose of cooking free meals for the poor. Would anyone say that, according to the ordinary understanding of the English language, in enquiring whether the kitchen was used for charitable purposes one must shut out of consideration what was being done with the meals

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which were being prepared in it. Other illustrations were suggested during the argument such as a room used by the Red Cross for packing parcels for despatch to prisoners of war. According to the Commissioner's contention that room could not be said to be used for charitable purposes; it was merely a place where parcels were packed and what was to become of the parcels was irrelevant. When the contention is applied to hospitals the consequences are not less striking. It having been argued that the user of Fort Lodge was not charitable because it was merely a place where eating and sleeping accommodation was provided for persons who were not the objects of a charity, it was pointed out that the same considerations would apply to the dormitories and dining rooms set apart for the use of nurses in the main building of the Fermanagh Hospital. Counsel for the Commissioner of Valuation did not shrink from accepting the logic of this argument. They contended that in strict law the position is that in a hospital only the rooms in which the patients are nursed and treated could be said to be used for charitable purposes and that such portions of the hereditament as are used in a manner which could not be considered charitable unless regard were allowed to be had to the object of their user must be held to be occupied and used for non-charitable purposes. According to this argument the nurses' quarters of a hospital, the kitchens, the laundry, the boiler house, the gate lodge, and any other portions of the hereditament in which patients are not actually nursed and treated cannot be said to be used for charitable purposes within section 2 of the Act of 1854. It follows that a hospital building which includes nurses' quarters, kitchens, laundry, etc., is not used *exclusively* for charitable purposes within the meaning of section 63 of the Poor Relief (Ireland) Act, 1838, and cannot escape liability for rates except in so far as the portions in which the patients are actually treated may be distinguished as used exclusively for charitable purposes under section 2 of the Act of 1854. Such is the Commissioner of Valuation's view of his duty in the event of the argument founded on *Moon's Case* (1) being accepted by

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this Court. I agree that this conclusion follows logically if the Commissioner's contention is correct that in determining whether premises are used for charitable purposes one is entitled merely to have regard to the actual activities carried on in the premises and is not entitled to consider the object of those activities. But the adoption by the Commissioner of such a view of his duty will, I imagine, work a revolution in the principles heretofore applied in regard to the valuation of the premises of hospitals and other charitable institutions, and will be somewhat of a shock to the governing bodies of such institutions. For my part, however, I cannot persuade myself that the view taken by the Commissioner is correct. I think it would never have been heard of if it had not been for the decision of the House of Lords in *Moon's Case* (1). And I think it is based upon an unfortunate misunderstanding of the scope and effect of that decision. In considering whether Fort Lodge is used for charitable purposes I am of opinion that we are not merely entitled to have regard to the fact that certain individuals live there but that we are also entitled to have regard to the fact that the individuals who live there are nurses employed in the County Hospital and also to the fact—if it be a fact—that they live there in pursuance of their duty as nurses employed in the hospital and that they are required to live there for the proper and efficient conduct and management of the Hospital. On this branch of the case I entirely agree with the conclusions arrived at by the Lord Chief Justice and MacDermott J. in the Divisional Court.

The second argument put forward on behalf of the Commissioner is that even if one is entitled to look outside Fort Lodge itself and to consider how its use is related to the activities carried on in the main buildings of the County Hospital, nevertheless the use of Fort Lodge as set out in the Case Stated is not a use exclusively for a charitable purpose. The authorities chiefly relied upon in support of this argument were the cases (most of them decisions of English Courts) in which certain premises were used and occupied by the

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Crown for public purposes, and the question arose as to the rateability of residences provided by the Crown for the accommodation of officials serving at those premises. It is alleged that those cases, of which *Gambier v. Lydford Overseers* (1) is cited as the typical example, lay down the broad principle that a residence provided for officials whose duties lie in premises exempt from rates will be held to be rateable if it is situated outside the curtilage of the exempted premises. It is to be remembered, of course, that in England there is no general statutory exemption from rating of buildings used for charitable purposes such as that contained in section 63 of the Irish Act of 1838. Governors of a hospital, for example, are rateable in respect of the hospital property (*London Corporation v. Stratton* (2).) The great exemption in England is of hereditaments occupied by the Crown, or by the servants of the Crown for the purposes of the Crown. And the point at issue in the various English cases such as *Gambier v. Lydford Overseers* (1), which were referred to in the argument was whether under the circumstances of the particular case the Crown was to be regarded as the occupier of the premises under consideration or whether the official who was permitted by the Crown to occupy the property was to be regarded as the occupier and was consequently to be treated as rateable. The question therefore presents itself in a somewhat different way in England from the way in which it presents itself under the Irish code. Nevertheless the English decisions are constantly referred to in the Irish cases as indicating and illustrating the principles to be followed. In my view the English decisions, whether directly in regard to rateability or upon the statutes under which questions in relation to the franchise depended on rateability, do not at all bear out the contention put forward on behalf of the Commissioner of Valuation that where residential accommodation was provided for an official of the Crown outside the curtilage of the premises where his official duty lay, he was necessarily and of course to be treated as the occupier of such accommodation and

(1) (1854) 3 E. & B. 346. (2) (1875) L.R. 7 H.L. 477.

to be rateable in respect thereof. No doubt passages can be culled from English judgments, such as those so much relied upon in the judgments of Lord Campbell C.J. and Wightman J. in *Gambier's Case* (1) where the fact that the residences were outside the walls of the premises where the officials worked was treated as making the distinction. But to conclude that such passages establish the alleged rule contended for by the Commissioner is to go much too far. On the one hand the alleged rule, if it had existed, would have afforded a simple test for deciding a large number of reported cases which the Courts certainly did not regard as capable of easy and simple solution. And on the other hand the alleged rule is entirely opposed to a number of dicta and decisions of undoubted authority. I need only refer to the judgments of Tindal C.J. in *Hughes v. Chatham Overseers* (2) and *Dobson v. Jones* (3) quoted recently with approval by Lord Wright M.R. in *Reed v. Cattermole* (4), and to the more modern decision of the English Court of Appeal in *Wixon v. Thomas* (No. 2) (5), The true rule, I think, is that laid down in Ryde on Rating, 8th Ed. (1946) at p. 140.

"It is submitted that the test which ought to be "applied, and which (in substance) has been applied "in most of the cases dealing with the servants of "the Crown, is the same as that suggested above in "deciding whether a person, in the service of a "subject, is rateable for the house in which he "resides. Exemption (it is submitted) should de- "pend on the question whether the officer is required, "as part of his duty, or merely permitted for his "own convenience, to reside in the quarters assigned "to him ; or (to put the question in another form) is "residence in the quarters, part of the services "which the officer is paid to perform, or is the "provision of the quarters merely a part of the "remuneration for these services ?"

and again at (p. 142) :—

"The cases above cited as to the rateability of

(1) (1854) 3 E. & B. 346.
(2) (1843) 5 Man. & Gr. 54.
(3) (1844) 5 Man. & Gr. 112.
(4) [1937] 1 K.B. 613, 624 625.
(5) [1912] 1 K.B. 690.

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"officers' quarters seem to show that if the dwelling "house is included in, or structurally forms part of, "a building which, as a whole, is occupied for Crown "purposes, it is much easier to make good the claim "to exemption, than if the dwelling house is a "separate building standing by itself; and that the "question whether there is an independent occupa- "tion of the house by the officer is a question of fact, "depending partly on the terms of his employment, "partly on the structural condition of the house."

That the question is a question of fact is established by the decision of the Court of Appeal in *Showers' Case* (1), and while in a doubtful case the fact that the officer's residence is away from the main building may be an important or even the decisive factor, nevertheless I cannot accept that there is any rule of law according to which that mere fact will of itself render the residence rateable necessarily and as of course.

So far I have not considered the Irish cases. But I think they will all be found to fall under the above principle. *Heron v. Monaghen* (2) is a typical example of the application of the principle. And in *Commissioner of Valuation v. O'Connell* (3) Palles C.B. puts the precise point: "In the present case, in my opinion, "this house was provided for the benefit and con- "venience of the parish priest, and not as imposing "upon him the personal *obligation* of residence there "which medical gentlemen and nurses may be sub- "jected to."

In the case now before the Court the occupiers of Fort Lodge are of course the Committee of Management of the County Hospital and not the nurses who from time to time reside in the building. The question for decision is whether this use and occupation is for a charitable purpose. I do not think that the cases in regard to the position of Crown servants residing in houses provided by the Crown which were relied upon so much in the argument constitute a complete analogy. But availing oneself of such assistance as may be obtained from the principles upon which those cases

(1) [1891] 1 Q.B. 339.
(2) (1888) 22 L.R.Ir. 532.
(3) [1906] 2 I.R. 479, 485, 486.

were decided, I think one may arrive at the test which should be applied in the present case. If Fort Lodge were merely a hostel in which nurses employed at the Hospital were permitted to reside if they wished, simply for their own convenience and as part of their remuneration, then I do not think that it could be regarded as used by the Committee of Management of the Hospital for charitable purposes. If on the other hand the position is that Fort Lodge is provided and maintained by the Committee for the proper, efficient management and conduct of the Hospital, and that the nurses are not simply allowed to reside there if they so desire but are required to reside in the building as part of their duty in order to secure efficiency in the work of the Hospital, then in my opinion Fort Lodge is used by the Committee of Management of the Hospital for a charitable purpose within section 2 of the Act of 1854. There is no precise finding in the Case Stated directed to this distinction. But one infers from paragraph 5 of the Case that the nurses accommodated in Fort Lodge are in exactly the same position as the nurses accommodated in the main building of the Hospital, and, indeed, I understood the argument before us to proceed on the footing that the nurses accommodated in Fort Lodge were required by the Committee of Management to live there in performance of their duty and that this was done for the purpose of the efficient operation of the Hospital. In these circumstances I would think it scarcely necessary to send the case back to the learned County Court Judge for an express finding on the matter, and would be prepared to hold that Fort Lodge was used for a charitable purpose within section 2 of the Act of 1854 and was used exclusively for such a purpose. I think this conclusion is entirely in accord with the views expressed in regard to hospitals by Palles C.B. in *O'Connell's Case* (1), and by Madden J. in *McKenna's Case* (2). In *O'Connell's Case* (1) Palles C.B. says: "I desire to be distinctly understood as not deciding "that if the main purpose for which a building is used "is a charitable one, as is that of a hospital for the

(1) (1906) 2 I.R. 479, 485. (2) (1915) 49 I.L.T.R. 103.

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" gratuitous healing of the poor, the residence therein, " as part of their duty, of nurses or a resident physician " would necessarily render the use ' not exclusively for " ' charitable purposes.' I should be prepared to hold " quite the contrary." If the residence of the nurses in the accommodation provided for them in the main Hospital building does not prevent the user of that main building from being exclusively for charitable purposes, this clearly involves the proposition that the nurses' accommodation in the main building is to be regarded as being exclusively for charitable purposes. And if that is so I cannot see how the accommodation in Fort Lodge, used as it is in precisely the same way and for precisely the same purposes as the nurses' quarters in the main building, can be treated as not being used exclusively for charitable purposes unless, indeed, the Commissioner is correct in the conclusion sought to be drawn from *Moon's Case* (1), in my opinion through a misapprehension as to the scope and effect of *Moon's Case* (1), that in considering whether a hereditament is used for a charitable purpose one must close one's eyes to everything not manifest upon the hereditament itself.

Accordingly I would be for affirming the decision of the King's Bench Division.

Appeal allowed.

Solicitor for the appellant, the Commissioner of Valuation for Northern Ireland : *F. C. MacNeice.*

Solicitors for the respondents, the Committee of Management of the Fermanagh County Hospital : *Maguire & Herbert.*

J. McC.

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K.B.D. 1947.

Feb. 14; Mar. 4.

Negligence—Damages—Grant to injured person from fund voluntarily subscribed by public to relieve distress—Whether to be taken into account in assessing damages.

In a railway accident caused by the negligence of the railway company's servants a number of passengers was killed or injured, and in order to relieve the resulting distress a fund was established which was voluntarily supported by the public. In an action for damages for personal injuries brought by one of the passengers the railway company administered interrogatories directed to ascertain the amount of the sums received by him from the fund.

Held, that the interrogatories were directed to a matter irrelevant to the issues in the action.

Damages which would otherwise be due to an injured party are not to be reduced by reason of the fact that the injured party has received without legal right moneys from a fund voluntarily subscribed from charitable motives by third parties after the damage has accrued.

MOTION to compel the plaintiff to answer interrogatories.

The plaintiff brought an action against the defendants for damages for personal injuries sustained by him while a passenger on the defendants' railway, the injuries being caused by the negligence of the defendants' servants. After the pleadings had closed the defendants sent the plaintiff a notice for particulars including: "The sum or sums, if any, received from "any source in respect of the alleged period of in- "capacity, with all appropriate details, including the "sum or sums received from charitable sources." The plaintiff replied that he had not earned any money since the date of the accident, and that "any sums "received by him since that date were insurance and "charitable payments and the same were not relevant "matters in this action."

The defendants moved the court for an order that the plaintiff might be directed to furnish the said

(1) In the King's Bench Division before Andrews L.C.J.

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particulars. The motion was refused, but the defendants were allowed to administer interrogatories including—

(1) Were any sums of money received by the plaintiff from any charitable or other source in respect of the period of incapacity alleged in the action to have been sustained by the plaintiff ?

(2) If the answer to Question (1) be yes, then from what source were the said sums received ?

(3) If the answer to Question (1) be yes, then what sums were received ?

The plaintiff in his affidavit replied that he objected to answer the interrogatories in so far as they related to moneys received from charitable sources (if any), on the ground of irrelevancy.

The defendants now moved the court that the plaintiff might be directed to make an answer on affidavit to the said interrogatories and that all proceedings might be stayed pending the answers to be made by the plaintiff.

Nicholson K.C., *Hanna K.C.* and *Brown* for the plaintiff.

Sheil K.C., *Topping K.C.* and *Jones* for the defendants.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS L.C.J. : This is a motion by the defendants to compel the plaintiff to answer certain interrogatories administered pursuant to leave granted by this Court on the 22nd November last. The ground upon which the plaintiff refused to answer the interrogatories relating to moneys received by him from charitable sources (to which alone the arguments before me were directed) was that the same were irrelevant to any matter in question in the action.

The action was brought to recover damages for personal injuries sustained by the plaintiff by reason of the alleged negligence of the defendants when a rail motor train collided with the train in which the plaintiff was travelling from Bangor West Halt to Belfast, on

the 10th January, 1945. The collision was a very serious one resulting in the death of a large number of the passengers and causing injuries to others, including the plaintiff. As most of the passengers killed or injured were workmen proceeding to their City employment, much distress was caused ; and in its relief the Mayor of Bangor, in which town many of them lived, opened a Fund which received much public support, a total sum of upwards of £17,000 being subscribed. Out of this Fund payments were made to many of those who had suffered injury or loss ; and the interrogatories in question were directed to ascertain the extent, if any, to which the plaintiff participated in the distribution of the Fund. As the negligence of the defendants has been already established in a test action, the object of the interrogatories was avowedly to assist the defendants in determining the sum which they should lodge in Court to meet the plaintiff's claim.

The plaintiff resisted the defendant's motion before me on the ground relied upon by him in the affidavit which he filed in answer to the interrogatories, namely, their irrelevancy ; and this issue resolved itself simply into the question of whether in the assessment of damages the defendants were entitled to obtain credit for the moneys received by the plaintiff from the Fund. Their submission, expressed briefly, was that the plaintiff was only entitled to recover such a sum as was commensurate with and would compensate him for his loss ; and that unless a deduction were allowed of the amount of these charity moneys received by the plaintiff from the gross estimate of his damages, he would in fact receive more than the amount of his actual loss.

In support of his argument on behalf of the defendants Mr. Sheil relied strongly upon the claim of £5 per week for loss of wages set out in the plaintiff's particulars of special damage, a total sum of £195 being claimed under this head of damage from the date of the accident to the 3rd October, 1945, the date of delivery of the Statement of Claim. It was this part of the claim which he argued was "illusory," for the moneys which the plaintiff had received from the Fund

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had materially reduced it. To be paid this sum again would involve, as he contended, the plaintiff's making a profit out of the wages' claim. Mr. Sheil submitted that it would be just the same as claiming payment for a doctor's bill which had been already paid by a third party. I have been unable to appreciate this argument, as the payments were made purely as a compassionate allowance to mitigate distress ; and there is no evidence whatever to show that they were paid solely in respect of or to satisfy pro tanto this particular head of damage.

For the plaintiff Mr. Nicholson submitted that the proposition advanced on behalf of the defendants was untenable ; that no case had been cited in support of the deduction from damages of payments made to a plaintiff from such a purely voluntary charitable fund ; and that it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent Railway Company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely, if not entirely, dried up.

But the issue must be determined not upon what I may call its general merits but upon legal principle and authority. Most of the cases cited by counsel—none of which, it is admitted, conclusively rules the present case—were actions brought under Lord Campbell's Act, in which, as is well established, the measure of damages is the pecuniary loss, actual or prospective, suffered by the dependants of the deceased by reason of his death. The first case, however, to which I shall refer—*Bradburn v. The Great Western Railway Company* (1)—was not a death case, but one in which a plaintiff, who had taken out an accident insurance policy and received payment under it, successfully contended that the sum so paid to him should not be taken into account in reduction of the damages to which he was entitled for personal injuries caused by the defendants' negligence. Bramwell B.,

(1) (1874) L.R. 10 Ex. 1.

in referring to the defendants' argument, said : "One "is dismayed at this proposition." He referred to *Dalby v. India & London Life-Assurance Co.* (1) as deciding that one who pays premiums for the purpose of insuring himself, does so on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid. That case was, he held, an authority for the case then before him as shewing that the plaintiff was entitled to retain the benefit which he had paid for in addition to the damages which he recovered on account of the defendants' negligence. Piggott B., who had presided and so ruled at the trial after consultation with Lord Coleridge C.J., concurred in the Court of Exchequer with Bramwell B., pointing out that the plaintiff does not receive the money from the insurance company because of the accident but because he has made a contract providing for the contingency. An accident, he said, must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it. Whilst the present case differs from *Bradburn's Case* (2) in that there was no policy and, accordingly, no payment of premiums by the plaintiff, the distinction so drawn by the learned Baron between the accident as a *causa sine qua non* and the contract of insurance as the *causa causans* of the plaintiff receiving the policy money is not without its importance in the consideration of the present case.

Bradburn's Case (2) was cited with approval by Denman J. in *Jebsen v. East & West India Dock Co.* (3), and by Viscount Haldane L.C. in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.* (4). The facts in this latter case, in which the question at issue was the measure of damages upon a breach of contract, were very different from the present. The importance of the Lord Chancellor's reference to *Bradburn's Case* (2), however, is that he assigns as the reason of the decision that it was not the accident, but a contract wholly

(1) (1854)15 C.B. 365.
(2) (1874) L.R. 10 Ex. 1.
(3) (1875) L.R. 10 C.P. 300. 305.
(4) [1912] A.C. 673, 690.

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independent of the relation between the plaintiff and the defendants, which gave the plaintiff his advantage. These words express in general terms a proposition which, with the substitution of a purely charity fund for contract, is wide enough to cover the present case.

Mr. Nicholson also directed my attention to the speech of Viscount Haldane in *Williams Bros. v. Ed. T. Agius, Ltd.* (1). There the learned Lord Chancellor referred to and approved of the judgment of Lord Esher in *Rodocanachi v. Milburn* (2), in which he laid it down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. "This decision," he continued, "is quite in "harmony with what was recently said in this House "in *British Westinghouse Co. v. Underground Electric* "*Railways Co.* (3), where it was pointed out that a "subsequent transaction, if it is to be taken into "account in mitigating damages, must be one which "arises out of transactions naturally attributable to "the consequences of the breach, and must not be of an "independent character."

Admittedly, the present case differs from the *British Westinghouse* (3) and *Williams* (1) cases in one important respect, namely, that they were actions for breach of contract whilst in the present case we are concerned with the measure of damages in an action of tort; but I am quite unable to appreciate why any different principle should apply. The important consideration, to my mind, common to all these cases, is that the circumstance relied upon in mitigation of damages arose independently of the cause of action, and was not naturally attributable to it. Whilst admittedly a sequence it was not a consequence. It arose really as the result of a *novus actus interveniens*, and was not the outcome of the relations between the plaintiff and the defendants which gave rise to the cause of action. The defendants' wrongful act may in each case have been a *causa sine qua non*, but in no

(1) [1914] A.C. 510, 520.
(2) (1887) 18 Q.B.D. 67.
(3) [1912] A.C. 673.

true sense was it the *causa causans* of the circumstance relied upon in mitigation of damages. In the present case the *causa causans* of the Fund was not the accident, but the bounty or charitable motives of the subscribers.

Mr. Sheil relied upon behalf of the defendants upon the decision of the Court of Appeal in *Baker v. Dalgleish S.S. Co.* (1). Greer J., who tried the action (2), had held that in assessing the damages in an action under the Fatal Accidents Act, 1846, the fact that the plaintiff is in receipt of a pension dependent on the bounty of the Crown cannot be taken into account. In the course of his judgment Greer J. said (3): "In "many cases workmen subscribe substantial sums "for the relief of widows and families of their fellow-"workmen killed by accident. Could it possibly be "contended that those voluntary gifts should be taken "into account in estimating the loss sustained? I "think not. I think the wife and children of the "deceased workman would have suffered loss by "reason of the death even though the generosity of "friends may have procured for them a sum which "equalizes the benefits they would have received if "the deceased had not died. The death is not the "cause in any proper sense of the voluntary con-"tribution of friends, and it would be a gross injustice "if the benefit of such contributions were to be "assessed in relief of the wrongdoer. I think the same "principles apply to a voluntary pension dependent "on the bounty of the Crown, and for these reasons I "think the plaintiff is entitled to succeed."

The Court of Appeal, though affirming the decision of Greer J. on other grounds with which we are not concerned in the present case, took a different view in regard to the plaintiff's receipt of the pension from the Crown, holding that the fact that the plaintiff was in consequence of the death in receipt of such pension ought, as a general rule, to be taken into consideration, notwithstanding that the pension is dependent on the voluntary bounty of the Crown. The Court was of

(1) [1922] 1 K.B. 361.
(2) Reported at [1921] 3 KB. 481.
(3) Ibid. 485-6.

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opinion that the fact that the Minister of Pensions had absolute discretion either to grant or to continue any pension did not exclude such pensions from consideration, and that the reasonable expectation of their continuance must be taken into account. In so holding, however, the Court clearly differentiated between the case of a pension such as that which they had to consider and such a case as that referred to by Greer J. Thus Bankes L.J. said (1): "This expectation" (i.e., the reasonable expectation of the continuance of the pension) "is widely different in my opinion from the "expectation of receiving benefit from voluntary "subscriptions of workmen to which Greer J. refers." This passage I interpret as a clear indication of the learned Lord Justice's concurrence in the view expressed by Greer J. in regard to the receipt by a plaintiff of moneys from a fund derived from such voluntary subscriptions; and this interpretation is fully supported by a passage in the judgment of Younger L.J. (2) in which, referring to Greer J.'s disregard of the payments of pension, past as well as future, he says that the learned judge had treated these payments as being the substantial equivalent of the sums frequently subscribed by workmen for the relief of the widow and family of a fellow-workman killed by an accident. In the normal case, he adds, he would agree with him in thinking that such voluntary gifts would not be taken into account in estimating the compensation payable by a defendant wrongdoer under Lord Campbell's Act; but his reason for agreeing with him would be that, while the fatal accident to the deceased was in these cases the *causa sine qua non* of the subscription, it was the occasion but not the *causa causans* of its payment.

I have found it necessary to refer to these passages at length in order to establish, as I think they clearly do, that the opinions both of the trial judge and of the members of the Court of Appeal in *Baker v. Dalgleish Steam Shipping Co.* (3) do not assist, but rather are destructive of the defendants' submissions in the present case; and I adopt the views of these learned

(1) [1922] 1 K.B. 361, 369.
(2) Ibid. 380.
(3) [1922] 1 K.B. 361.

judges, differentiating payments out of pension funds from purely voluntary subscription funds, as a short answer to the decisions in *Johnson v. Hill* (1), and *Lory v. Great Western Railway Company* (2) upon which Mr. Sheil also strongly relied. In all such cases funds were in existence before the death from which there was at least a reasonable prospect of accruing benefit. In the present case the fund, which was non-contributory, is not one from which there could have been any expectation of payment at the time of the accident, for it only came into existence after the happening of the disaster, and as a result of the public's sympathy with and compassion for the victims and their families in their distress. In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public ? It is for the party who is in default to pay for such damage as he has caused and which is directly occasioned by his negligence without bringing into the account in reduction of his liability any moneys which may be received by the injured party without legal right from a fund voluntarily subscribed from charitable motives by third parties after the damage had accrued. The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damages. The creation of the fund was a circumstance of a wholly independent or collateral character to the defendants' negligence ; and from it there could at the time of the accident have been no reasonable expectation of pecuniary benefit.

I would add that since writing the foregoing judgment I find my opinion confirmed by a reference in Beven on Negligence, 4th Edit., at pp. 261-2 to a decision of the

(1) (1945) 61 T.L.R. 398.

(2) [1942] W.N. 73 ; [1942] 1 All.E.R. 230.

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New Zealand Court of Appeal—*Greymount Point, etc., Co. v. McIvor* (1), in which the rule was laid down, as the learned editors say correctly, that evidence to be admissible in diminution of the loss sustained by the death of a parent in an action under the New Zealand Act corresponding to our Lord Campbell's Act must be of acquisition of property "coming into the "possession of the family at the death of the parent "acquired or accruing by the death of the parent," and not of a fund subscribed or a contribution made in consequence of the death from extraneous sources.

For all these reasons I am of opinion that the matters to which the defendants have directed their interrogatories are irrelevant to the issues in the action; and their motion must, accordingly, be dismissed with costs.

Motion dismissed.

Solicitors for the plaintiff: *N. & F. Tughan.*

Solicitors for the defendant: *E. & R. D. Bates.*

M. V. P.

(1) (1897) 16 N.Z.L.R.258,267.

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June 16, 17; July 30.

Landlord and tenant—Rent Restrictions Acts—Subletting without consent of landlord—Action for possession—Rights of subtenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 12 (1), 15 (3)—*Rent and Mortgage Interest Restrictions Act* (*Northern Ireland*), 1925 (15 & 16 *Geo.* 5, *c.* 12), *s.* 4.

Section 5 (5) of the Increase of Rent and Mortgage (Restrictions) Act, 1920 (as now contained in section 4 of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925) and section 15 (3) of the Act of 1920 do not confer upon a subtenant of a dwelling-house within those Acts any greater degree of protection than that conferred upon a tenant by section 5 (1) of the Act of 1920.

Accordingly where an order for the recovery of possession of a dwelling-house was made against a tenant it was *held* that the court could make an order for the recovery of possession against a subtenant to whom the premises had been sublet without the consent of the landlord if the court was satisfied that it was reasonable to make such order.

Lord Hylton v. Heal [1921] 2 K.B. 438 approved.

CASE STATED by Babington L.J. sitting as assize judge at the Spring Assizes for the County of Fermanagh on appeal from the County Court of Fermanagh.

Charles Bartley was tenant of a dwelling-house in Enniskillen on a parol letting from the 1st November, 1912, at a yearly rent of £35. Charles Bartley died on the 21st October, 1945. The defendant Catherine Lynch was housekeeper to Charles Bartley and was residing in the dwelling-house at the time of his death. No member of Charles Bartley's family resided in the dwelling-house at the time of his death. By his last will Charles Bartley left the residue of his estate, which included his interest in the dwelling-house, to his six children in equal shares, and appointed his son, the defendant Frederick Bartley, as his executor.

(1) In the Court of Appeal before Andrews L.C.J., Porter L.J. and Black J.

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Frederick Bartley as executor of his father's will, but before probate had been taken out, by parol agreement sublet the dwelling-house to Catherine Lynch at a yearly rent of £40 from November, 1945. This subletting was without the consent of the landlords. In December, 1945, the landlords served notice to quit the premises on the 1st November, 1946, and on the 6th December, 1946, issued a civil bill ejectment against the defendant Frederick Bartley for overholding, and against Catherine Lynch as the person in actual possession of the premises. On the 15th January, 1946, probate of Charles Bartley's will was granted to the defendant Frederick Bartley.

The county court judge dismissed the civil bill on the ground that it was not reasonable to make the order sought. On appeal to the judge of assize it was held by Babington L.J. that the defendant Frederick Bartley was not in occupation of any part of the premises and therefore not protected by the Rent Restrictions Acts, that the defendant Catherine Lynch was not protected under those Acts by reason of the subletting, that on the facts it was reasonable to make the order sought, and that accordingly the landlords were entitled to a decree for possession of the premises against both defendants ; but he stated a case for the opinion of the Court of Appeal. The question raised in the case stated was : Whether Catherine Lynch is protected by the letting made to her by the executor Bartley.

Johnson K.C. and *Stewart* for the defendants (appellants).

Patton K.C. and *Gibson* for the plaintiffs (respondents).

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : This is a case stated by Babington L.J. at the last County Fermanagh Spring Assizes. The plaintiffs are the owners of a dwelling-house known as 3 Fairview Place, Enniskillen, which was let by them to one Charles Bartley, now deceased, on a parol letting from the 1st November, 1912, at the yearly rent of £35.

Charles Bartley died on the 21st October, 1945. No member of his family was resident with him at the time of his death. By his will Charles Bartley left the residue of his estate, which included his interest in the said house, to his six children in equal shares. His interest in the house vested after his death in his son, the defendant Frederick D. Bartley, as his executor. The other defendant, Catherine Lynch, resided with Charles Bartley for over twenty years before his death as his housekeeper. Immediately thereafter, but before extracting probate, Frederick D. Bartley, as such executor, made a parol subletting of the house to the defendant, Catherine Lynch, as tenant from month to month at the rent of £3 6s. 8d. per month. Rent receipts covering the entire period from November, 1945, were produced; and the County Court Judge treated the subletting as a genuine and not fictitious one. The learned Judge of Assize apparently took the same view, and the case was argued before us on that basis. The said defendant, Catherine Lynch, has another house of her own in South Street, Enniskillen, which is occupied by her son who lives there rent free and also by lodgers who pay rent to her.

On the 21st December, 1945, the plaintiffs wrote to the defendant Catherine Lynch demanding possession of the premises, and upon the 31st December, 1945, served a notice to quit expiring on the 1st November, 1946. On the 6th December, 1946, the plaintiffs issued a civil bill ejectment against the defendant, Frederick D. Bartley, for overholding, and against the defendant, Catherine Lynch, as a person in actual possession of the premises. The county court judge dismissed the civil bill, holding that it was not reasonable for him to make the order sought as provided by section five of the "principal Act" of 1920 which is now contained in section four of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925. This finding of fact was reversed by Babington L.J., who has held that it was reasonable to make such order; but the learned judge reserved for this court the question as to whether the defendant, Catherine Lynch, is protected by the letting

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which was made to her as above stated.

The position of the two defendants must be separately considered. As regards the defendant, Frederick D. Bartley, it is clear that he was never in occupation of the premises at any time; and it is a fundamental principle of the Rent Restrictions Acts, as established in this court in *The Martin Estates Co. Ltd., v. Watt and Hunter* (1), and in England in *Skinner v. Geary* (2), that they were designed only to protect tenants who are in personal occupation or actual possession of the premises. Accordingly, the defendant Bartley, who never enjoyed such occupation, cannot claim the protection of the Acts; and, as the notice to quit put an end to his contractual tenancy, a decree for possession must be made against him. This conclusion was not challenged in argument by the defendants' counsel.

As regards the defendant Catherine Lynch, Babington L.J. has held that the subletting did not protect her; but the grounds upon which he so held are not stated. This issue is therefore entirely at large.

The case was argued at considerable length by counsel for both parties; but I do not find it necessary to refer to these arguments in detail. I am greatly indebted to my colleague, Black J., who has referred me since the hearing to the decision of an English Divisional Court, consisting of Rowlatt and Bailhache JJ., in *Lord Hylton v. Heal* (3)—a decision which does not appear to have been since questioned, and which places upon the relevant sections of the Acts a construction which I accept and which in my opinion is destructive of the defendant, Catherine Lynch's case. That case is based entirely upon section 15 (3) of the Act of 1920 and section 5 (5) of the same Act as now contained in section 4 of the Northern Ireland Act of 1925 (4). The contention made on her behalf is that

(1) [1925] N.I. 79.
(2) [1931] 2 K.B. 546.
(3) [1921] 2 K.B. 438.

(4) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (5), as now contained in Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925, s. 4:

"An order or judgment against "a tenant for the recovery of "possession of any dwelling-"house to which this Act applies, "or for ejectment therefrom, "shall not affect the right of any

the premises were "lawfully sublet" to Catherine Lynch, the subtenant, as provided by both these sections, and that, as the interest of the tenant is determined under the provisions of section 5, she is deemed under section 15 (3) to be tenant of the plaintiffs on the same terms as she would have held from the tenant if the tenancy had continued. This argument is plausible, but it does not bear close examination. I am prepared to hold with the defendant, Catherine Lynch, that the premises were "lawfully sub-let" to her—a conclusion strongly contested by plaintiffs' counsel on the twofold ground, first, that it was not competent for the executor to make this subletting in the ordinary course of his administration, and, secondly, that it was made contrary to the provisions of section 5 (1) (*i*), which, it was urged, prohibited subletting of the whole of the dwelling-house without the consent of the landlord. This I would say, in passing, is an entire misconception of the subsection which is not in form or in fact a prohibition, but merely a provision which enables the landlord to recover possession where the tenant without such consent has made such subletting.

Where the defendants' arguments fails in my opinion is that it ignores important controlling and limiting words in both subsections 15 (3) of the Act of 1920 and 5 (5) of the Act of 1925. In the former section the subtenant is only deemed to become the tenant of the landlord "subject to the provisions of this Act," which gives to the subsection the meaning expressed by Rowlatt J. in *Lord Hylton v. Heal* (1), that where the interest of the original tenant has been lawfully

"sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant."

s. 15 (3) "Where the interest of any tenant of a dwelling-house to which this Act applies is determined, either as a result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

(1) [1921] 2 K.B. 438, 449.

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determined, then any subtenant, *assuming that he is entitled to retain possession under the provisions of the Act* (the italics are mine) shall, notwithstanding that the title under which he derived his interest has come to an end, continue to be tenant on the terms mentioned in the subsection. The section therefore only applies so as to make the subtenant the tenant of the landlord where the premises have been lawfully sublet and where the Act so provides. Accordingly, section 15 (3) refers inferentially to section 5, and defines the legal position of subtenants who are entitled to protection under it. In precisely the same way when we turn to section 5 (5) we find that the provision that an order or judgment against a tenant shall not affect the right of any subtenant to whom the premises have been lawfully sublet, as therein specified, to retain possession, is qualified or limited in its application by the words "under this section" which immediately follow. The whole scope and object of this subsection was (whilst recognising the independent and substantive position of the subtenant which, not absolutely, but to a limited extent is conferred by the Act) to render it necessary for a landlord seeking to dispossess a subtenant to institute proceedings against him. In other words, the order or judgment against the tenant would not suffice where the subletting was lawful and was made before proceedings for recovery of possession were commenced. Such subtenant is entitled to have his rights ascertained independently of his immediate landlord—the tenant; but in determining such rights regard must be had to the provisions of the whole of section 5, for the right which is protected under section 5 (5) is the right to retain possession *under that section*. Accordingly, as Rowlatt J. says, in such proceedings the subtenant "can urge whatever matters he may "think fit, including matters personal as between "himself and the landlord affecting the reasonableness "of the landlord's demand, which is one of the elements "to be taken into account in the proceedings." The term "tenant" in section 5 (1) in my opinion includes "subtenant," as the context does not otherwise require (see section 12 (1) (*g*) of the Act of 1920).

In the present proceedings, to which she was a party, the subtenant, Catherine Lynch, had a full opportunity of bringing forward any relevant matters which she thought proper to satisfy the Court that it was not reasonable to make the order sought; but, notwithstanding this, Babington L.J. arrived at the conclusion that it was reasonable to make the order—a finding of fact which is of course binding upon us in this case stated. When once this fact has been clearly established it appears to me that a decree must go against the subtenant; for it is inconceivable that the Legislature should ever have intended that, in a matter of mutual rights and obligations such as subletting, the tenant, who had made such subletting without the consent of his landlord, should be liable to have an order for possession made against him whilst the subtenant was entitled to nullify the landlord's rights by retaining possession. The case has been brought by the plaintiffs on its facts within the provisions of section 5. I could not regard retention of possession by a subtenant in the circumstances of the present case as the right of a subtenant "under this section" (i.e., under section 5) unless such subtenant were able to establish, which she has not done, that it was not reasonable to make an order for possession against her. At the risk of repetition I refer again in this connection to section 15 (3) merely to state the same conclusion in other words, namely, that the subtenant, Catherine Lynch, is not under that section deemed to be the tenant of the plaintiffs; for the operation of this subsection is "subject to the provisions of the Act"; and the provisions of section 5 negative the subtenant's right in the present case to be so deemed.

For these reasons I hold that the question submitted to us should be answered in the negative. The plaintiffs must have their costs, which we measure at twenty guineas.

I have been asked by Porter L.J. to say that he has read the judgment which I have delivered and that he concurs in it.

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BLACK J.

BLACK J. : I concur with the judgment just delivered by the Lord Chief Justice.

It was conceded during the argument that as the defendant Frederick D. Bartley had sublet the whole of the premises and was not in actual possession of any part thereof he could not claim the protection of the Rent Restrictions Acts and that a decree of possession must be made against him.

The defendant, Catherine Lynch, however, claims to be protected from ejectment by virtue of the provisions of section 5 (5) of the Act of 1920 (as now contained in section 4 of the Act of 1925) and of section 15 (3) of the Act of 1920. Her case is that inasmuch as the contractual tenancy of the late Charles Bartley was not subject to any condition debarring him from subletting the premises and as the subletting to her was made by Charles Bartley's executor during the currency of that contractual tenancy and before service by the plaintiffs of the notice to quit, she is in the position of a person to whom the premises have been lawfully sublet within the meaning of section 5 (5) and section 15 (3) of the Act of 1920 and is entitled under those subsections to protection against ejectment.

At first sight section 5 (5) and section 15 (3) seem to overlap but on closer examination it would appear that it is section 5 (5) which contains the effective provisions protecting subtenants from eviction and that, as pointed out by Bankes L.J., in *Remon v. City of London Real Property Co.* (1), the object of section 15 (3) is to indicate the legal position of subtenants who continue in occupation merely by virtue of the protection afforded by section 5 (5). In order, therefore, to determine whether the subtenant in the present case is protected we must go back to the provisions of section 5.

Section 5 (1) enacts that no order or judgment for the recovery of possession of a dwelling-house to which the Act applies or for the ejectment of a tenant therefrom shall be made or given except in the circumstances set out in one or other of the eleven subheads (*a*) to (*k*)

(1) [1921] 1 K.B. 49, 55.

enumerated in the subsection and unless in any such case the court considers it reasonable to make such an order or give such judgment. And section 5 (5) provides that an order or judgment against a tenant for the recovery of possession of a dwelling-house to which the Act applies or for ejectment therefrom shall not affect the right of any subtenant to whom the premises or any part thereof have been lawfully sublet before proceedings for recovery of possession or ejectment were commenced to retain possession under section 5 or be in any way operative against any such subtenant.

On behalf of the subtenant it is sought to read section 5 (5) as meaning that, even if the landlord is entitled to obtain a decree of possession against his immediate tenant by reason of any of the circumstances set out in subheads (*a*) to (*k*) in section 5 (1), a subtenant to whom the premises have been lawfully sublet is nevertheless entitled to retain possession against the landlord despite the existence of the circumstances enabling the landlord to evict his immediate tenant. In my opinion this is an entirely mistaken view of the effect of section 5 (5). The strange and, indeed, absurd consequences of such a view have been pointed out by Rowlatt J. in *Lord Hylton v. Heal* (1). Thus under subhead (*c*) of section 5 (1) an order for recovery of possession may be made if the tenant has given notice to quit and the landlord has contracted to sell or let the house or has taken any other steps as a result of which he would, in the opinion of the Court, be seriously prejudiced if he could not obtain possession. Again under subhead (*d*) (now repealed by section 2 (2) of the Act of 1943) an order for recovery of possession might in certain circumstances have been made if the dwelling-house was required by the landlord for occupation as a residence for himself. Then under subhead (*f*) an order may be made if the house is reasonably required for the purpose of the execution of the statutory duties or powers of a local authority or for any purpose which in the opinion of the court is in the public interest and the court is satisfied that

(1) [1921] 2 K.B. 438.

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alternative accommodation is available for the tenant and his family. So also under subhead (*h*) an order may be made if the house is required for occupation as a residence by a former tenant who gave up occupation in consequence of his service in any of His Majesty's Forces during the 1914/1918 War, or under subhead (*k*) if the house is the sole or principal dwelling-house on an agricultural or pastoral holding which has been let separately from the holding and the landlord is desirous of selling the holding.

Could the Legislature ever have intended that in any of these cases the landlord might be entitled to recover possession if the dwelling-house was in the occupation of his immediate tenant but that if by any chance part of the dwelling-house had been lawfully sublet to a subtenant, then by the operation of section 5 (5) the landlord was absolutely and definitely debarred from recovering possession from the subtenant of the portion so sublet? Moreover, it is to be noticed that the provision of section 5 (5) is that an order for possession shall not affect the right to retain possession under the section of any subtenant to whom the premises or any part thereof have been lawfully sublet before proceedings for ejectment were commenced. Whatever may be the precise protection afforded by the subsection it extends not only to cover subtenancies created before the original tenancy is determined but also to cover tenancies created right up to the commencement of ejectment proceedings. If the subtenant's contention in the present proceedings were sound, the result would be that a landlord who had a perfectly good claim to recover possession upon any of the grounds specified in subheads (*a*) to (*k*) could be effectively balked from recovering clear possession of his house by the tenant making a subletting of portion of it at any time up to the actual institution by the landlord of the ejectment proceedings, except perhaps in the one case where the tenancy agreement contained an express provision prohibiting subletting. One would be slow to hold that section 5 (5) can have this startling effect. Such a construction was expressly negatived by a Divisional Court in *Lord Hylton v.*

Heal (1), in regard to a claim for possession based upon subhead (*c*) of section 5 (1). In my opinion the true effect of section 5 (5) is as follows :—At Common Law the landlord of a dwelling-house could bring an action of ejectment against his tenant as soon as the tenancy had come to an end whether by effluxion of time or by being determined by a notice to quit. As against the landlord no subtenancy could outlast the original tenancy and accordingly after the expiration of the original tenancy the landlord was entitled to an order for possession not only as against the tenant but also as against all subtenants. The effect of section 5 (1) of the Act of 1920 was to debar the landlord of a dwelling-house to which the Act applied from obtaining an order of ejectment unless the circumstances exist which are set out in one or other of the subheads (*a*) to (*k*) in section 5 (1). If none of those circumstances exist the landlord is absolutely precluded from sustaining an action of ejectment. If, however, any of those circumstances exist he may bring his action and if he succeeds in establishing the existence of such circumstances an order of ejectment may be made in his favour but only if the Court considers it reasonable to make such an order. If no part of the house is sublet it will only be necessary to consider whether it is reasonable to make such an order against the tenant. But if the whole or a part of the house is sublet it will be necessary to consider also the position of the subtenant or subtenants, and whether it would be reasonable to make such an order as against them. The phrase contained in section 5 (5) is that an order for ejectment against a tenant should not affect the right of any subtenant to retain possession *under the section*. What then is the right of a subtenant to retain possession under the section ? By section 12 (1) (*g*) of the Act of 1920 the expression " tenant " except where the context otherwise requires includes subtenant. It would, therefore, appear that the word tenant in the third line of section 5 (1) is to be read as including subtenant. If this is so, then so far as regards a subtenant section 5 (1) is to be read as providing that no

(1) [1921] 2 K.B. 438.

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order or judgment for the ejectment of a subtenant shall be made or given unless the circumstances specified in one or other of the subheads (*a*) to (*k*) exist and unless in addition the Court considers it reasonable to make such order or give such judgment. This, in my opinion, is what is referred to in section 5 (5) as the right of the subtenant to retain possession under the section. It is his right to retain possession unless the landlord can establish the existence of the circumstances mentioned in at least one of the subheads (*a*) to (*k*) and can also convince the Court that it is reasonable to make an order or give a judgment of ejectment against the subtenant. The effect of section 5 (5) as I read it is merely to provide that an order or judgment against the tenant is not to affect this right of the subtenant or to be in any way operative against the subtenant. In other words, even if the Court thinks it reasonable to make an order of ejectment against the tenant such order is not to bring about automatically the ejectment also of the subtenant. Whether the subtenant is joined as a defendant in the same proceedings as the tenant or whether separate and subsequent proceedings are brought against the subtenant the Court must address itself quite separately to the position of the subtenant and must consider whether, in all the circumstances of the case, it would be reasonable to make such an order as would result in the eviction of the subtenant. If the Court does not consider it reasonable to make such an order against the subtenant he will be entitled to retain possession notwithstanding the eviction of the tenant and will retain possession upon the condition set out in section 15 (3). This, in my view, is the protection given to subtenants by section 5. I cannot accept the view of section 5 (5) presented on behalf of the subtenant in the present appeal, that section 5 (5) confers upon subtenants a right vastly in excess of that conferred by section 5 (1) upon tenants, namely a right to retain possession without any regard to whether it is reasonable to allow them to do so, even although the landlord proves the existence of circumstances specified in one or more of the subheads (*a*) to (*k*) of section 5 (1). My view of

section 5 (5) accords with that expressed by Rowlatt J. and accepted by Bailhache J. in *Lord Hylton v. Heal* (1), where Rowlatt J. says in reference to section 5 (5): "In my view this subsection only means that where "there is a subtenant lawfully and de facto in possession "of the house, the landlord who desires to recover "possession cannot avail himself as against the sub-"tenant of any order or judgment which he may have "recovered against the tenant, but must commence "separate proceedings against the subtenant, in which "the latter can urge whatever matters he may think "fit, including matters personal as between himself "and the landlord affecting the reasonableness of the "landlord's demand, which is one of the elements to "be taken into account in the proceedings. That, I "think, is the purpose to which this subsection is "limited."

In the present case the plaintiffs claim that the circumstances fall within those specified in subhead (*i*) of section 5 (1), namely, that the tenant without the consent of the landlord had after the passing of the Act sublet the whole of the dwelling-house. It was argued on behalf of the subtenant that this subhead ought to be read as applying only to a case where the subletting was made in breach of a condition precluding the tenant from subletting without the landlord's consent. I cannot accept this argument. A subletting in breach of such a condition would fall within subhead (*a*). I am of opinion that subhead (*i*) allows the landlord to put forward a claim for recovery of possession where there has been a subletting which may be perfectly lawful but which was made without the landlord's consent. It is to be observed that the subhead only makes such sublettings available as a foundation for obtaining an order for possession when they have been made after the passing of the Act. Notwithstanding ingenious argument to the contrary, I am content to assume the subletting by Frederick D. Bartley to have been a perfectly lawful subletting so that the subtenant is a person to whom the premises were lawfully sublet within the meaning of that phrase

(1) [1921] 2 K.B. 438, 449.

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in section 5 (5) and section 15 (3). Nevertheless, inasmuch as the subletting was without the consent of the landlord within the meaning of subhead (*i*), I am of opinion that the court was entitled to grant a decree of ejectment against the subtenant if it considered it reasonable to make such an order or give such a judgment. In the case stated it is set out that having regard to the facts the learned Lord Justice held that it was reasonable to make such order. This was a matter entirely for him to decide, and his decision on this point must be accepted by this court. If I am correct in my view of the effect of the Acts in regard to subtenants it follows that he was entitled to make the decree of ejectment against both defendants.

We were referred during the argument to the decision of the Court of Session upon almost identical facts in the case of *Dalrymple's Trustees v. Brown* (1). Although s. 5 (5) and s. 15 (3) are not discussed in the judgments in that case as reported they were referred to and relied upon by counsel for the defender, and it would appear tolerably clear from its decision in favour of the pursuers that the Court of Session must have taken substantially the same view of the effect of those subsections as has commended itself to this court.

Appeal dismissed.

Solicitor for the appellants : *P. J. Flanagan.*

Solicitors for the respondents : *Cooper & Cooper.*

M.V.P.

(1) [1945] S.C. 190.

REX (L. M. S. RAILWAY COMPANY) v. JUSTICES OF THE COUNTY OF THE CITY OF BELFAST (1).

K.B.D. (Crown Side.) 1947.

April 23; May 7.

Emergency legislation—Food rationing—Prosecution for unlawfully obtaining rationed food—Proceedings to be instituted "by a "constable"—Whether District Inspector of Royal Ulster Constabulary a constable—Defence (General) Regulations, 1939 (*S. R. & O.*, 1939, *No.* 927), *regs.* 55, 55A, 55A, 93 (1), 102 (1)—*Food Rationing (General Provisions) Order*, 1945 (*S. R. & O.*, 1945, *No.* 861), *art.* 9 (1).

Notwithstanding that modern statute law of the Parliament of Northern Ireland draws a distinction between police officers and constables, the term "constable" is appropriate to describe any member of the police force in Northern Ireland. Accordingly, where regulation 93 (1) of the Defence (General) Regulations, 1939, provides that proceedings for offences against the regulations may be instituted "by a constable" it was *held* that such proceedings might be instituted by a District Inspector of the Royal Ulster Constabulary.

MOTION to make absolute a conditional order of certiorari.

The facts of the case and arguments of counsel sufficiently appear in the judgment of the Lord Chief Justice.

Nicholson K.C. and *Gibson* in support of the motion.

McVeigh (with him *Sheil K.C.*) for the Crown.

Cur. adv. vult.

ANDREWS L.C.J. ANDREWS L.C.J.: This is a motion on behalf of the London Midland and Scottish Railway Company to make absolute a conditional order of certiorari, dated 28th February, 1947, directed to the Justices of the Peace of the City of Belfast to remove into the King's Bench Division for the purpose of being quashed all orders and adjudications of the said Justices made on 27th January, 1947, on the hearing of a complaint in

(1) In the King's Bench Division (Crown Side) before Andrews L.C.J. and Porter L.J.

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which M. Adair Crawford, District Inspector of the Royal Ulster Constabulary, was complainant, and the London Midland & Scottish Railway Co. (N.C.C.) were defendants, charging that the defendants at Belfast, between 13th and 19th January, 1946, did act in contravention of regulations 55, 55A and 55B of the Defence (General) Regulations, 1939, by contravening an order made thereunder, namely, the Food Rationing (General Provisions) Order, 1945, No. 861, article 9 (1), in that they did obtain certain rationed food . . . in excess of the quantity specified in their weekly allocation issued by or on behalf of the Minister of Food. The proceedings resulted in a conviction with a fine of 40*s*. 0*d*. and 2*s*. 0*d*. costs. The ground on which the conditional order was sought and obtained was that the said order of the justices was made without and in excess of jurisdiction, inasmuch as the proceedings were not instituted either by a constable or by or with the consent of the Attorney-General for Northern Ireland as required by regulation 93 (1) of the Defence (General) Regulations, 1939, as amended.

The issue involved is a short one and depends entirely upon the meaning to be attached in Northern Ireland to the word " constable " as used in regulation 93 (1). Does it include a District Inspector of the Royal Ulster Constabulary ? The regulation, so far as is relevant, reads as follows :—

> " Proceedings for an offence against any of these " Regulations may, unless the Regulation otherwise " provides, be instituted either by a constable or by, " or with the consent of, the Director of Public " Prosecutions . . . ; but, subject to any special " provisions contained in these Regulations, pro- " ceedings shall not be instituted for an offence " against any of these Regulations otherwise than " as aforesaid."

By regulation 102 (1) in the application of the regulations to Northern Ireland references to the Director of Public Prosecutions shall be construed as references to the Attorney-General for Northern Ireland. It is admitted that the Attorney-General gave no consent to the institution of these proceedings.

The point to be determined, which is admittedly purely technical and devoid of merit, yet has its importance as going to jurisdiction ; and, having been made by Mr. Gibson at the opening of the case before the magistrates, it must be determined by us. It is stated that our decision will rule many other pending cases.

The argument advanced by Mr. Nicholson on behalf of the Railway Company may be briefly stated. The word " constable " has, he contended, a well defined meaning in Northern Ireland different from and narrower than that which it bears in England, and applying only to the lowest rank of the Royal Ulster Constabulary. In England admittedly the word includes a Constabulary officer. So also in Ireland we find in the provisions of the Constabulary (Ireland) Act, 1836, 6 Will. IV, c. 13, the term Chief Constable—an officer who, by section 11 of the Constabulary (Ireland) Act, 1839, came to be styled sub-inspector. In the Royal Irish Constabulary Act, 1874, " Members " of the Constabulary force " includes several named officers and Head and other Constables. By section 12 of the Constabulary and Police (Ireland) Act, 1883, sub-inspectors came to be styled district inspectors. In the Constabulary Act (Northern Ireland), 1922, under which the Royal Ulster Constabulary was established, a distinction is drawn both in enacting sections and in the First Schedule between officers and constables ; and in the definition section (section 9), which, it is to be noted, is prefaced with the words " In this Act," the expression " officer " is declared to include the Inspector General, the Deputy Inspector General, a County Inspector . . . and a District Inspector ; whilst the expression " constable " includes a head constable, sergeant and constable. A new schedule appended to the amending Act—the Constabulary Act (Northern Ireland), 1928—preserves the same distinction. Mr. Nicholson also referred us to the words " Any police officer or constable " in paragraph 6 of the Second Schedule to the Intoxicating Liquor Act (Northern Ireland), 1923, and to sections 20, 21, 28 (1), and particularly to section 45 (2) of the

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Criminal Justice (Northern Ireland) Act, 1945, by which it is enacted that "constable" shall be construed as including a head constable and sergeant. This definition is of course, as he submitted, not wide enough to include a district inspector. Finally, Mr. Nicholson directed our attention to regulations Nos. 102 (5) and 40 A.A. (4), of the Defence (General) Regulations, 1939, as showing on his submission an appreciation on the part of the framers of the Regulations of the difference in the designations of members of the English and Royal Ulster Constabulary forces and of the meaning attached to the term "constable" in Northern Ireland." In particular, he referred also to the former regulation 29B, clause 5 (c) of which provided that that regulation, in its application to Northern Ireland, should have effect subject to (amongst others) the modification that for reference to a constable and to constables there shall be substituted respectively references to a member of the Royal Ulster Constabulary and to members of that Constabulary. In these circumstances he contended that if the word "constable" in its application to Northern Ireland was not to receive in regulation 93 (1) its generally accepted meaning under the existing Northern Ireland Constabulary code, provision ought to have been made to that effect in that regulation.

This argument, which was clearly and forcibly presented, sounds in the first instance attractive, but on more mature consideration I have come to the conclusion that it should not prevail. One must, of course, recognise that the matter is not free from ambiguity; and one wonders why an amendment of regulation 93 (1) was never effected so as to remove all room for doubt, especially as we were informed by Mr. McVeigh that the matter had on one or more occasions received official consideration.

My opinion in favour of the complainant is based primarily on the consideration that, historically regarded, the term "constable" is appropriate, as a generic term, to describe any member of the constabulary or police force in Northern Ireland, even though the word in popular parlance and in modern

statute law of the Parliament of Northern Ireland bears a more restricted meaning. In my opinion, however, the use of the words " In this Act " in one or more of the definition sections of these Acts shows clearly that these definitions, introduced for convenience in grading of members of the Force, and for other purposes, have only a limited operation, and that they were not intended to render obsolete the original conception and meaning of the term which one finds in the Oxford Dictionary to be an officer of the peace, a member of the constabulary or police force, or a policeman. Such is really the meaning which Lord Hewart L.C.J. assigned to it in *Lewis v. Cattle* (1), where he said : " In my opinion, it is true to say that " every police officer in England and Wales, whether " he be a member of the Metropolitan Police Force or " a member of the police force of a county, city, or " borough, holds the office of constable, and within " his constablewick has all the duties and rights con- " ferred by common law or statute on the holders of " that office."

There are several other reasons why in my opinion this wider meaning should be assigned to the word " constable " in regulation 93 (1). In the first place, as Cleasby B. expressed it in *Courtauld v. Legh* (2) : " It is a sound rule of construction to give the same " meaning to the same words occurring in different " parts of an act of parliament or other document." In my opinion it is an equally sound rule to give the same meaning to a word in an Act of Parliament, or, as in the present case, in a regulation made under the authority of an Act of Parliament, over the whole area to which that Act of Parliament or regulation applies, unless a contrary intention is clearly expressed.

In the second place, I would consider together the two cardinal rules of construction—(1) that Acts of Parliament should be construed according to the intention of the Parliament which passed them ; and (2), as Keating J. said in *Boon v. Howard* (3) : " I hold

(1) [1938] 2 K.B. 454, 457.
(2) [1869] L.R. 4 Ex. 126, 130.
(3) (1874) L.R. 9 C.P. 277, 308.

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"it to be an essential canon of construction, that, if "the words are susceptible of a reasonable and also "of an unreasonable construction, the former con- "struction must prevail." This is the well authenticated *argumentum ab inconvenienti* of Lord Coke. As I apply these principles to the present case, I am compelled to the conclusion that the Legislature responsible for regulation 93 (1) must have intended the word "constable" to have the same wider and more general meaning in Northern Ireland as in England; for it would be difficult to explain, and still more to justify, an intention on the part of the framers of this regulation that a man holding the lowest rank in the Royal Ulster Constabulary could, whilst his superior officers could not, institute proceedings under the regulation without the consent of the Attorney-General for Northern Ireland. All such difficulty and anomaly disappears if one attributes to the word "constable" the wider meaning, and so ascribes the necessity for the Attorney-General's consent only to proceedings instituted by common informers who, if not restrained, might proceed not in the public interest, but because they were actuated by some of the baser motives such as anger, prejudice or revenge.

In conclusion, I would add that Mr. McVeigh by reference to section 1 (7) of the Criminal Injuries (Ireland) Act, 1919, has shown that Parliament in that year preserved in that definition subsection the original conception of the term "constable" by providing that the term "police constable" in section 1 of that Act should include any member of the Royal Irish Constabulary or Dublin Metropolitan Police. Regard being had to this definition, it cannot in my opinion be said that the older and wider meaning of the word "constable" has been entirely abandoned or rendered obsolete by modern legislation.

For all these reasons I am of opinion that the cause shown should be allowed and the conditional order discharged with costs.

PORTER L.J.: I concur with the judgment which the Lord Chief Justice has delivered.

Conditional order discharged.

Solicitors for the applicant: *O'Rorke, McDonald & Tweed.*

Solicitors for the Crown: *Chief Crown Solicitor.*

J. McC.

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CRIMINAL LAW—EVIDENCE—*Dying declaration—Admissibility—Declaration procured by interrogation of deceased—Evidence of accomplices—Corroboration—Direction to jury.* The accused was convicted of the manslaughter of a girl by using an instrument to procure an abortion which resulted in the girl's death. A written statement signed by the deceased girl was admitted in evidence at the trial as a dying declaration although it appeared that the statement had been obtained by an interrogation of the deceased by a police inspector. Evidence for the prosecution was also given by C. who had knowingly taken the girl to the accused's premises in order to procure an abortion. For the accused it was contended that the dying declaration was wrongly admitted that the dying declaration and the evidence of C. were the testimony of accomplices, and that the jury had not been properly directed on the danger of acting on such testimony without corroboration; and that the trial judge had failed to give the jury sufficient guidance as to the nature of a dying declaration and the considerations bearing upon the weight to be attached to such declarations. Held, (i) that a statement otherwise admissible as a dying declaration is not rendered inadmissible on the ground that it is obtained by questions put to the deceased, though that fact may affect

the weight to be attached to such a declaration. *Rex v. Fitzpatrick* (1910) 46 I.L.T.R. 173 followed. (ii) that a warning to the jury of the danger of acting on the uncorroborated testimony of accomplices is not rendered nugatory by the fact that the judge does not identify by name the accomplices whose testimony should be corroborated, nor by the fact that the jury is directed that corroboration may be found in the evidence of the accused. *Quaere* whether the dying declaration of an accomplice is within the rule of practice that the jury should be warned of the danger of convicting on the uncorroborated testimony of an accomplice. (iii) that a dying declaration is testimony of an unusual character which should be scrutinised with special care and attention since such testimony cannot be tested or amplified by cross-examination ; and it is the duty of the judge at the trial to impress these considerations upon the jury. *Rex v. Thomas Edward Stephenson.* [C.C.A.110

CRIMINAL LAW—PRACTICE—*Sentence—Prisoner arraigned for murder pleading guilty of manslaughter—Plea accepted—Right of trial judge to read depositions—Whether plea of guilty admits truth of averments in depositions—Trial judge not entitled to assume a deliberate killing.* A prisoner arraigned on indictment charging him with murder pleaded " guilty of man-" slaughter." The plea was accepted by the Crown with the approval of the trial judge, who, after reading the depositions, passed a sentence of twelve years penal servitude on the assumption that the killing was by the deliberate act of the prisoner. There was no evidence in the depositions that the killing was consequent on provocation or done in self-defence. The prisoner appealed against the sentence on the ground that the judge was not entitled to read the depositions before passing sentence ; and that the sentence was based on wrong principles and was excessive. *Held*, (i) that the trial judge was entitled to read the depositions for the purpose of assessing the appropriate sentence. A plea of guilty cannot be regarded as an admission of guilt in the abstract divorced from the essential facts constituting the particular offence which it confesses, and where such essential facts appear in the depositions their truth must be taken to be admitted and cannot be challenged by the prisoner if to do so would be incompatible with the plea. Otherwise the prisoner is not bound by the depositions and is free to dispute their truth ; and if he does so the trial judge must either leave the disputed matter out of account in assessing the sentence, or receive evidence upon it and reach a finding. (ii) that since the acceptance of the plea negatived pure accident, and as there was no evidence that the killing was consequent on provocation or done in self-defence, the plea could only be regarded as a confession of killing by some negligent act, and it was therefore not open to the trial judge to interpret it as a killing by deliberate act, and that accordingly the sentence was based on a wrong principle and must be reduced. *Rex v. Robert John McKee.* [C.C.A. 27

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withstanding that modern statute law of the Parliament of Northern Ireland draws a distinction between police officers and constables, the term "constable" is appropriate to describe any member of the police force in Northern Ireland. Accordingly, where regulation 93 (1) of the Defence (General)Regulations, 1939, provides that proceedings for offences against the regulations may be instituted "by a constable" it was *held* that such proceedings might be instituted by a District Inspector of the Royal Ulster Constabulary. *Rex (L.M.S. Railway Company) v. Justices of the County of the City of Belfast.* [K.B.D. 00

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FACTORY—Dangerous machinery—*Injury to infant workman—Statutory duty not to permit young persons to operate machinery without instructions—Negligence of foreman—Common employment—Remoteness of damage—Factories Act (Northern Ireland), 1938 (2 Geo. 6, c. 23), section 22—Factories (Dangerous Machines—Training of Young Persons) Order (Northern Ireland), 1939 (S. R. & O., (N.I.) 1939, No. 54.* Section 22 of the Factories Act (Northern Ireland), 1938, prohibits a young person from operating a dangerous machine to which that section applies unless he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed, and has either received a sufficient training in work at the machine or is under adequate supervision by a person who has a thorough knowledge and experience of the machine. The plaintiff, a young person within the Act and employed by the defendants, was injured when assisting in the testing of a machine to which section 22 applied and in the use of which he had received no instruction. The plaintiff was placing a piece of metal in position in the machine which was being operated by a pedal controlled by a foreman-fitter who negligently operated the pedal when the plaintiff's hand was in the machine. The plaintiff contended (*inter alia*) that the defendants were guilty of a breach of statutory duty in permitting him to work at the machine in contravention of section 22. The defendants denied any breach of statutory duty and alternatively pleaded contributory negligence. They further contended that the plaintiff himself was guilty of the same breach of statutory duty; that any failure to instruct the plaintiff in the use of the machine was the negligence of a fellow servant of the plaintiff, and accordingly the defence of common employment applied; and that the damage suffered by the plaintiff did not flow from the breach of statutory duty but from the negligence of the foreman-fitter. *Held*, (i) that section 22 imposed a duty on the defendants not to permit a young person employed by them to operate the machine without such young person being properly instructed as to the dangers arising in connection with the machine and the precautions to be observed, and that the defendants had committed a breach of that duty; (ii) that section 22 did not impose a corresponding duty on the plaintiff not to operate the machine, and the plaintiff had accordingly committed no breach of statutory duty; (iii) that the defence of common employment did not apply as the duty in question was not merely a statutory duty to instruct young persons in the use of the machine but a statutory duty not to permit young persons to operate the machine if such young persons had not been given the required instructions *Cribb v. Kynoch, Ltd.* [1907] 2 K.B. 548, and *Young v. Hoffman Manufacturing Co., Ltd.* [1907] 2 K.B. 646 distinguished. (iv) that the plaintiff's injuries were the natural and probable consequence of the breach of statutory fiuty, and that the act of the foreman-dtter was not a *novus actus interveniens. Shearer v. Harland & Wolff, Ltd,* .. .. .. [K.B.D. 102

INFANT—Injury to Infant Workman 102
See Factory.

INTOXICATING LIQUOR .. 93
See Licensing Acts.

LANDLORD AND TENANT—Rent Restrictions Acts—*Subletting without consent of landlord—Action for possession—Rights of subtenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s.*

12 (1), 15 (3)—*Rent and Mortgage Interest Restrictions Act (Northern Ireland)*, 1925 (15 & 16 *Geo.* 5, *c.* 12), *s.* 4. Section 5 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as now contained in section 4 of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925) and section 15 (3) of the Act of 1920 do not confer upon a subtenant of a dwelling-house within these Acts any greater degree of protection than that conferred upon a tenant by section 5 (1) of the Act of 1920. Accordingly where an order for the recovery of possession of a dwelling-house was made against a tenant it was *held* that the court could make an order for the recovery of possession against a subtenant to whom the premises had been sublet without the consent of the landlord if the court was satisfied that it was reasonable to make such order. *Lord Hylton v. Heal* [1921] 2 K.B. 438 approved. *Enniskillen U. D. C. v Bartley and Lynch.* .. [C.A. 000

LICENSING ACTS—*Prosecutions for unlawfully allowing intoxicating liquor to be consumed on licensed premises during prohibited hours and unlawfully being on licensed premises during prohibited hours—What are prohibited hours—Refreshment Houses (Ireland) Act*, 1860 (23 & 24 *Vict.*, *c.* 107), *section* 43—*Licensing Act*, 1872 (35 & 36 *Vict.*, *c.* 94), *section* 78—*Licensing Act (Ireland)*, 1874 (37 & 38 *Vict.*, *c.* 69), *section* 27—*Intoxicating Liquor Act (Northern Ireland)*, 1923 (13 *P* 14 *Geo.* 5, *c.* 12), *section* 7 (1), *Second Schedule, Part I*, 1. C. was a publican and the proprietor of licensed premises in a town in respect of which section 78 of the Licensing Act, 1872, had amended the closing hour of licensed premises from 11 p.m. as formerly provided by the Refreshment Houses (Ireland) Act, 1860, section 43, to 10 p.m. Section 78 of the Licensing Act, 1872, further provided that "any "person who sells or exposes for sale, "or opens or keeps open any premises "for the sale of, intoxicating liquors at "any other times than those limited "for such purpose by [the Act of 1860] "as the same is amended by this "section, or during such times as "aforesaid allows any intoxicating "liquors to be consumed on such "premises" should be liable to a penalty. Paragraph 1 of Part I of the Second Schedule to the Intoxicating Liquor Act (Northern Ireland), 1923, in its application to this class of premises provided: "Notwithstanding "anything in any enactment it shall "not be lawful for any person to sell, "or expose for sale, intoxicating "liquor, or to open or keep open any "premises for the sale of intoxicating "liquor, (whether for consumption on "or off the premises) at or during any "hours on week days, except the "following, that is to say: the hours ". . . ending not later than nine at "night." Three customers entered C.'s licensed premises before the hour of 9 p.m. and ordered alcoholic liquor which was delivered to them and paid for by them before that hour; but thereafter the three customers continued on the premises, and part of the liquor thus previously purchased was consumed by them between the hours of 9 p.m. and 10 p.m. C. was prosecuted under section 78 of the Licensing Act, 1872, for unlawfully allowing intoxicating liquors to be consumed on licensed premises during prohibited hours, and the three customers were prosecuted under section 27 of the Licensing Act (Ireland), 1874, for unlawfully being on licensed premises during prohibited hours. It was contended on behalf of all the defendants that the effect of paragraph 1 of Part I of the Second Schedule to the Act of 1923 was to alter the prohibited hour from 10 p.m. to 9 p.m. only in the cases of the four offences specified in that paragraph, and as the offence of allowing liquor to be consumed outside prohibited hours was not an offence so specified it continued to be governed by the Act of 1872 in which the prohibited hours commence at 10 p.m. *Held*, that the effect of the Act of 1923 was to amend section 78 of the Act of 1872 by substituting new prohibited hours in respect of all matters specified in that section; and that the combined effect of the two enactments was to make it an offence to allow liquor to be consumed on licensed premises after the hour of 9 p.m. *Tease v. Coll and Others.* .. .. [K.B.D. 93

MALICIOUS INJURY 46
See CRIMINAL INJURY.

MASTER AND SERVANT—COMMON EMPLOYMENT 1

See NEGLIGENCE—DANGEROUS ACT DONE ON PREMISES.
——CONTROL OF EMPLOYMENT .. 34
See EMERGENCY LEGISLATION—CONTROL OF EMPLOYMENT.

NEGLIGENCE—*Continuing negligence of plaintiff—Opportunity of avoiding consequences of defendant's negligence.* In an action by a pedestrian against a motor-cyclist for damages for personal injury sustained in a collision caused by the defendant's negligence the defence of contributory negligence was pleaded. It was contended for the defendant that the plaintiff's contributory negligence was a continuing negligence which persisted up to the moment of collision and that therefore the plaintiff was necessarily precluded from recovery. *Held*, that the fact that the plaintiff's negligence persisted up to the moment of collision was not necessarily inconsistent with the plaintiff having had no opportunity of avoiding by reasonable care the consequences of the defendant's negligence; that this was a question of fact; and that upon the facts of the case the plaintiff had no such opportunity. Dicta in *Campbell v. John Kelly, Ltd.* [1945] N.I. 70, examined. *Ross v. McQueen* .. .. [K.B.D. 81

NEGLIGENCE—DAMAGES—*Grant to injured person from fund voluntarily subscribed by public to relieve distress—Whether to be taken into account in assessing damages.* In a railway accident caused by the negligence of the railway company's servants a number of passengers was killed or injured, and in order to relieve the resulting distress a fund was established which was voluntarily supported by the public. In an action for damages for personal injuries brought by one of the passengers the railway company administered interrogatories directed to ascertain the amount of the sums received by him from the fund. *Held*, that the interrogatories were directed to a matter irrelevant to the issues in the action. Damages which would otherwise be due to an injured party are not to be reduced by reason of the fact that the injured party has received without legal right moneys from a fund voluntarily subscribed from charitable motives by third parties after the damage has accrued. *Redpath v. Belfast and County Down Railway.* .. .. .. [K.B.D. 000

NEGLIGENCE—DANGEROUS ACT DONE ON PREMISES—*Voluntary assistance of occupier's servants by stranger—Volunteer—Common employment*—The plaintiff, a coal-merchant's carter, while on the defendants' premises for the purpose of taking delivery of a consignment of coal on behalf of his master, was injured by the negligent operation by the defendants' servant of a crane which was so overloaded as to be dangerous to those in its vicinity. At the time of the accident the plaintiff, at the request of this servant, was temporarily assisting in the operation of lifting by means of the crane a load in which neither the plaintiff nor his master had an interest. The defendants denied negligence and contended further that at the time of the accident the plaintiff was a volunteer, and as such, was precluded from recovering by reason of the doctrine of common employment. *Held*, (i) that the plaintiff came on the premises as an invitee; but that even if he had, by deviating from the purpose which brought him on the premises, become a trespasser, his presence was known to the defendants, who were accordingly under a duty not to do a dangerous act likely to injure him without giving warning, and that they had failed in that duty; (ii) that since there was no actual contract of service between the plaintiff and the defendants the doctrine of common employment could have no application; and (iii) that the plaintiff though a volunteer was not a "mere volunteer" and was entitled to recover. The rule that one who has volunteered to assist the servants of another in their work is in certain circumstances precluded from recovering against the master for damage caused by the negligence of such servants is not an application of the doctrine of common employment, and such a volunteer will be precluded from recovering only if he is a "mere "volunteer" to whom in all circumstances of the case the master owed no duty to exercise reasonable care. The meaning of "mere volunteer" considered: *Degg v. Midland Railway Co.* (1857) 1 H. & N. 773, examined and explained. *Fitzgerald v. Great Northern Railway (Ireland)* .. [K.B.D. 1

PRACTICE—CRIMINAL INJURY—APPEAL 46
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RATING—VALUATION—CHARITY 125
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See VALUATION.

——23 & 24 Vict., c. 107, s. 43 .. 93
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——35 & 36 Vict., c. 94, s. 78 .. 93
See LICENSING ACTS.

——37 & 38 Vict., c. 69, s. 27 .. 93
See LICENSING ACTS.

——61 & 62 Vict., c. 37, s. 5 .. 46
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——9 Geo. 5, c. 14, s. 1 46
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——10 & 11 Geo. 5, c. 17, ss. 12 (1), 15 (3) 000
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——13 & 14 Geo. 5 (N.I.), c. 12, s. 7 (1), Second Schedule, I (1) .. 93
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——15 & 16 Geo. 5, (N.I.), c. 12 s.4 00
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See EMERGENCY LEGISLATION CONTROL OF EMPLOYMENT

——Regs. 55, 55A, 93 (1), 102 (1) 000
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——Factories (Dangerous Machines—Training of Young Persons) Order (Northern Ireland), 1939 (S. R. & O. (N.I.), No. 54 of 1939) 102
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——Conditions of Employment and National Arbitration Order (Northern Ireland), 1940 (S. R. & O. No. 1508 of 1940) .. 34
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——Food Rationing (General Provisions) Order, 1945 (S. R. &. O. No. 861 of 1945) Art. 9 (1) 000
See EMERGENCY LEGISLATION —FOOD RATIONING.

VALUATION — RATING — *Hereditament occupied as residence for nurses in connection with county hospital—Whether used exclusively for charitable purposes—Valuation (Ireland) Act*, 1852 (15 & 16 *Vict., c.* 63), *sections* 12, 16—*Valuation (Ireland) Act*, 1854 (17 & 18 *Vict., c.* 8), *section* 2. A detached dwelling-house standing in private grounds was leased to the Committee of Management of a County Hospital and used by them for the sleeping and living accommodation of part of the nursing staff employed at the Hospital. The hereditament in question was distinct from and situated some distance from the lands of the Hospital. The Committee of Management claimed to have this hereditament distinguished in the valuation list as being used exclusively by them for charitable purposes. *Held*, by the Court of Appeal (Babington and Porter, L.JJ. Black J. dissenting) that the hereditament was not used exclusively for charitable purposes. In determining whether hereditaments are used exclusively for charitable purposes it is not permissible to look outside the hereditaments and to consider whether the user of the hereditaments can be associated with other hereditaments, the user of which is exclusively charitable. *Armagh County Infirmary Committee v. The Commissioner of Valuation for Northern Ireland* [1940] N.I. 1 doubted. Decision of the King's Bench Division (Andrews, L.C.J. and MacDermott J.) reversed. *Commissioner of Valuation for Northern Ireland v. Committee of Management of Fermanagh County Hospital* [C.A. 125

WILL—CONSTRUCTION—*Sums to be set aside each to produce "* £500 *per year "free of taxes"—Whether annuities or income of funds—"Free of taxes" at what rate—Investment of funds—Basis of calculation—Recovery by trustees of overpayments to beneficiaries—Direction to pay "free of taxes" referable to United Kingdom taxes only.* A testator gave his residuary estate to trustees in trust for J. D. for life and thereafter for such of the children or remoter issue of J. D. as J. D. should by deed or will appoint. J. D. by his will in exercise of the power directed the trustees to set aside sums of money sufficient (1) "to produce £500 per "year free of taxes and pay the same "by quarterly instalments" to W. D., and after the death of W. D. to hold "the capital and interest" for R. D. absolutely; and (2) "to produce £500 "per year free of taxes and pay the "same by quarterly instalments" to M. R., and after the death of M. R. to hold "the capital and interest" for R. D. absolutely, and he directed that during the minority of M. R. the income was to be paid to her guardian. The trustees did not set aside sums of money as directed by the appointor, but had paid the clear yearly sums of £500 each to W. D. and M. R. W. D. had at all times since the death of J. D. been resident out of the United Kingdom, and it was contended in the case of his appointment that the expression "free of taxes" should be construed to mean free of such taxes as might be locally imposed in the place where he was for the time being residing. *Held* by the Court of Appeal (Andrews L.C.J. and MacDermott J., Babington L.J. dissenting):—(1) that upon the true construction of the appointments contained in the will of J. D. the appointees were entitled to annuities of the specified amounts free of income tax at the rate from time to time prevailing. *Carmichael v. Gee* (1880) L.R. 5 App. Cas. 588 followed. (2) that in calculating the sums to be set aside to serve the annuities the trustees should take into account any exemptions, rebates or other reliefs in respect of income tax to which the appointees would be entitled so that the annuities would be the specified amounts net, save as modified by the provisions of the Finance Acts, 1941 and 1946. The principle of *In re Pettit* [1922] 2 Ch. 765 applied. (3) that if the income of any one of such sums so set aside should in any year not suffice to satisfy the annuity secured by such sum the trustees might resort to any accumulation of surplus income in previous years or in default thereof to the corpus of such sum. (4) that the trustees were entitled to recoup themselves by deduction from future payments the amounts, if any, which they had overpaid. (5) that the expression "free of taxes" in a will made in the United Kingdom by a testator resident in the United Kingdom refers to taxes imposed by the law of the United Kingdom in the absence of a contrary intention. *In re Norbury* [1939] Ch. 528 followed. Per Babington L.J.: that upon the true construction of the appointments contained in the will of J. D. the trustees should set aside and invest sums sufficient to produce the specified amounts free of United Kingdom income tax at the current rate in force when the sums were set aside, and should pay the incomes of such sums to or for the benefit of the appointees without any deduction in respect of reliefs or abatements to which the individual appointee might be entitled. Order of Black J. [1946] N.I. 90 varied. *In re Dunville: Brownrigg and Another v. Dunville and Others* .. .. .. [C.A. 50

WORDS—

——"constable" 000
See EMERGENCY LEGISLATION —FOOD RATIONING.

——"free of taxes" 50
See WILL.

——"mere volunteer" 1
See NEGLIGENCE—DANGEROUS ACT DONE ON PREMISES.